

SOCIAL JUSTICE AND DELIBERATIVE POLITICS

Why Martha Nussbaum's Capabilities Approach Needs a Deliberative Proceduralism as Normative Grounding



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Abstract

In this thesis the primary task has been to explore the potentials in Martha Nussbaum's *capabilities approach*, especially in terms of how she balances norms requiring respect for cultural diversity and individual choice with the need to challenge the effects of unjust social power. I find in Nussbaum's approach a good alternative to others, such as *utilitarian welfare theories* and Rawls's *justice as fairness theory*. Still, it could be improved by the addition of justificatory and, hence, procedural resources. In this respect, I argue that a normative grounding in a *Habermasian model of deliberative politics* would be the best alignment.

Abbreviations

Throughout this thesis, the main works by Martha C. Nussbaum are abbreviated as follows:

FJ *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: The Belknap Press of Harvard University Press, 2007).

SSJ *Sex and Social Justice* (Oxford: Oxford University Press, 2000).

WHD *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

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1 Introduction

1.1 Human Development and Global Justice

One of the initial articulations of the *capabilities approach* was in *The Quality of Life*, which Martha Nussbaum co-edited with her economist counterpart Amartya Sen.¹ Through this approach, they distanced themselves from former theoretical contributions on social justice – in particular certain strands of economic welfare theory and the political philosophy of John Rawls. The capabilities approach has since had large effect on debates regarding human development policies, and one of its most obvious practical consequences was the creation of the United Nations' Human Development Index. It also offers an advanced alternative to other quality of life assessments in the field of social and economic justice (substituting GNP or reports on general welfare).

In addition, as a normative theory of global justice, the capabilities approach has provided an new way of assessing the implementations of human rights. The achievements of international agreements and treaties in the area of human rights since the Second World War have been incredible. Both first-generation rights (political and civil liberties) and second-generation rights (economic, social and cultural rights) have been established at a global level. A third generation (including groups' rights, the right to development, sustainability, and a healthy environment) is also in the making. Martha Nussbaum's *capabilities approach*, the main object of concern in this thesis, can be said to cover the terrain occupied by all of these generations of rights. However, the language of capabilities offers another perspective on and important specification of the language of rights. The significance of *de facto* in addition to *de jure* implementation of rights is made particularly clear by the conceptions of the capabilities approach. For instance, "Women in many

¹ Martha C. Nussbaum, *The Quality of Life*, edited by Martha Nussbaum and Amartya Sen (Oxford: Oxford University 1993).

nations have a nominal right to political participation without having this right in the sense of capability; for example, they may be threatened with violence should they leave the home.”² In such instances, the capabilities approach provides a different perspective on normative assessment, complementary to the human rights approach in essential ways.

With its uncompromised focus on promoting opportunities for women and other marginalized groups, the capabilities approach offers a necessary standard of social justice assessment in underdeveloped societies as well as a critical basis for engaging with the injustices of modern welfare states. It has influenced debates of political philosophy and practical policy making in the field of social justice, and, in my view, it offers one of the most promising normative perspectives. However, in a world where needs, entitlements and interpretations of justice are likely to vary, one should be humble as to what a philosopher actually can prescribe. The formulation of a fair *deliberative procedure* can be as necessary for the successful implementation of justice as the ethical standards themselves.

1.2 Research Questions and Chapter Overview

In my view, Nussbaum’s capabilities approach is an attempt to answer the following normative aporiae: How can we as philosophers answer ideal demands of normativity, and at the same time be responsive to the world and its most urgent problems? How can we as feminists make sure our normative theories show respect for cultural diversity and individual choice; and at the same time challenge the known effects of unjust social power? How do we balance paternalism and relativism?

In this thesis, therefore, the overarching questions are: *Is Nussbaum’s capabilities approach a sufficient answer to these challenges? And if not, how can it be improved?* I seek to answer both questions by way of three separate discussions. The questions enumerated below provide the scaffolding on which the thesis is structured.

² Nussbaum, *FJ*, p. 287.

In chapter 2, “Nussbaum’s Capabilities Approach in Perspective,” I analyze the potentials in Nussbaum’s approach on the background of other theories of social justice – *utilitarian welfare theories* and Rawls’s *justice as fairness theory* respectfully. Through these discussions, my aim is to answer the following question: *In which respects is Nussbaum’s a different perspective from the other paradigmatic theories available?*

In chapter 3, “Social Justice and Justificatory Resources,” I analyze the deeper theoretical structures of Nussbaum’s approach. In these discussions both her application of John Rawls’s concept of an *overlapping consensus* and her solution to the problem of *adaptive preference formation* are used as objects of analysis. The main question is: *Can the capabilities approach provide sufficient justificatory resources?*

In chapter 4, “Social Justice and Deliberative Politics,” I discuss the further implications of Nussbaum’s theoretical structure, especially her demotion of *proceduralist approaches*. This will hopefully shed some light on the capabilities approach’s potential as well as its possible deficits. In this chapter, the key question is: *How can a ‘Habermasian model of deliberative politics’ offer the necessary correctives to Nussbaum’s capabilities approach?*

1.3 A Comment on Methodology

In accord with Nussbaum’s own approach, this thesis “[...] is a philosophical project, whose aim is to develop a particular type of normative philosophical theory. I am not an empirical social scientist, nor is this [thesis] intended as a record of sustained empirical research. But I do attempt to be responsive to empirical facts [...]”³

This methodological outset is based on the conviction that philosophical and normative theorizing can have practical political value, as well as it occupies a space not easily filled by other empirical sciences. This is due to the nature of normative reasoning. Moral norms are different from empirical statements in that they do not only *describe* our conduct or

³ Nussbaum, *WHD*, p. 10. My addition in the square brackets.

customs, but they *prescribe* them. “They make claims on us; they command, oblige, recommend or guide.”⁴ Furthermore, moral norms, in contrast to, say, mere conventions or customs, have binding force by way of their appeal to justifying grounds. The philosophical discipline sets out to explicate and evaluate the internal relationship between norms and their justifying grounds, which in turn can be said to constitute the rational foundation of normative validity.⁵

Since Nussbaum’s emphasis is on political philosophy. Chiefly, political philosophy can be said to concern itself with prescribing and evaluating the enforcement of justice standards. My aim is consequently to analyze the normative premises and implications of Nussbaum’s approach along these lines. I shall make use of resources of relevant philosophical literature as well as my own analytical arguments to assess the validity of Nussbaum’s claims.

My focus is on Nussbaum’s version of the capabilities approach, even if, for some, Sen will be the better known proponent of the theory. This is in part because Nussbaum, compared to her economist counterpart Sen, has dedicated herself completely to the philosophical perspective.⁶ It is also because I find her approach to offer a more succinct feminist perspective which, insofar as it explicates its capabilities standards, is the more challenging.

⁴ Christine Korsgaard, “The Normative Question,” in *The Sources of Normativity*, edited by Onora O’Neil (Cambridge: Cambridge University Press, 2004), p. 8.

⁵ Principally, I concur to the definitions laid down by Jürgen Habermas in his *Justification and Application*, translated by Ciaran Cronin, (Cambridge: The MIT Press, 1993), p. 41: “Duties [derive their] binding force from the validity of norms of interaction that claim to rest on good reasons. We feel obligated only by norms of which we believe that, if called upon to do so, we could explain why they both deserve and admit recognition on the part of their addressees (and those affected.) The internal connection between norms and justifying grounds constitutes the *rational foundation of normative validity*.”

⁶ That being said, Sen’s work is not void of philosophical reasoning. His latest work, *The Idea of Justice*, (Cambridge: The Belknap Press of Harvard University Press, 2009), is a comprehensive contribution to the philosophical debate of social justice.

Since the main object of the thesis is to explore the potentials of Nussbaum's approach, I do not review the other philosophical theories I employ in the discussions in any great detail. That said, whenever dictated by the needs of argumentative clarity, I enumerate the most essential aspects along the way.

2 Nussbaum's Capabilities Approach in Perspective

Before presenting the central elements of Nussbaum's capabilities approach (2.4) I find it relevant to sketch out part of the capabilities approach's philosophical *raison d'être*. I will do this by showing how the capabilities approach can read as a response to certain positions from within the discourse of social justice. These are especially *utilitarianism* (or *welfarism* as it is termed in economics) (2.1) and Rawls's *justice as fairness theory* (2.2). This, I hope, will shed some light on Nussbaum's capabilities approach and her potential as a theory of social justice.

2.1 Utilitarian Welfare Theory

Utilitarianism, or *welfarism*, is an umbrella concept for perspectives commonly applied in economic theories of distribution. In welfare theories the *distribuendum* – i.e. the entity to be distributed – is welfare or satisfaction of personal preferences. And, as stated by Nussbaum, “[the] capabilities approach was originally designed above all as an alternative to the economic-Utilitarian approaches that dominated, and to some degree still dominate, discussions of quality of life in international development and policy circles, especially approaches that understand the point of development in narrowly economic terms.”⁷ As economic welfare theory and utilitarianism inform actual public policy to a high degree, it is also important to analyse the theoretical presuppositions and consequences seriously.

Some of the basic premises of utilitarianism can be found in several contemporary post-metaphysical theories of moral philosophy. In *An Introduction to the Principles of Morals and Legislation* Jeremy Bentham lays out the main principle for utilitarianism in simple and persuasive terms.

⁷ Nussbaum, *FJ*, p. 71.

By the principle of utility is meant that principle which approves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.⁸

In my opinion, insisting on human experience as the only possible and legitimate normative benchmark is a shared premise – explicit or implicit – of many contemporary post-metaphysical theories. And it has a strong intuitive appeal. According to Bentham the happiness of *each* individual counts, and the interest of a community is never more than the sum of the interests of its members.⁹ Bentham’s moral position is secular, humanist and embraces respect for individuals’ preferences. These key principles are also shared by economic *welfarisms*, especially the high regard for individual choices and the maximization or *aggregation* of a society’s welfare. When calculating a distributive pattern with economic welfare theory both of these principles would be taken into account. It would be the increase in each person’s welfare relative to a certain amount of wealth and income that should guide us in how much resources or wealth each person should get.¹⁰

In addition, according to economic welfare theory, one should try to satisfy the *efficiency principle* (or *Pareto principle* to economists). “The principle holds that a configuration [e.g. a specific distribution of goods] is efficient if it is impossible to change it so as to make some persons (at least one) better off without the same time making other persons (at least one) worse off.”¹¹ At this point a distributive pattern would be as efficient as it possibly can, in respect of attaining the maximum welfare. The easiest way to satisfy the

⁸ Jeremy Bentham (et al.), *An Introduction to the Principles of Morals and Legislation* (New York: Methuen & Co., 1982), pp. 11–12.

⁹ Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 12.

¹⁰ Economic resources, as income and wealth, do not exhaust the terms *welfare* or *happiness*. Yet, they are strongly correlated to them. “[And] if we assume that the welfare of an individual increases when income increases, *ceteris paribus*, income can be used as a proxy for welfare.” Hilde Bojer, *Distributional Justice: Theory and Measurement* (London: Routledge, 2003), p. 21.

¹¹ Rawls, *A Theory of Justice*, p. 58. My addition in square brackets.

Pareto principle is if someone with very high income and wealth redistributes it to someone whose income and wealth are lower. This is due to the fact that the *marginal utility* of income and wealth is decreasing.¹² This perspective on distributive justice would seem to necessitate radical social change in terms of poverty reduction and enable redistributive taxation schemes.

On the other hand, as Rawls, Sen and Nussbaum¹³ have pointed out, one of the main problems with utilitarianism is that the efficiency principle seems to be the exclusive goal. In addition, because of the respect for individual preferences, the utilitarian is “principally obliged” not to ask how the welfare comes about. This means that utilitarianism in practice is *blind* to the different needs and preferences behind the subjectively reported states of welfare. But would not most people find the reasons behind the different preferences ethically relevant? Does utilitarianism only *seem* like a “progressive” scheme of redistribution, while it is in fact *inequality indifferent*?¹⁴ If person A has expensive and extravagant preferences, she would need high income and wealth to increase her welfare. Person B could be severely disabled and therefore need a great many resources to achieve a similar amount of welfare. In both cases the individuals would have low marginal utility. If

¹² “The increase in utility due to an increase in income of one unit, is called the marginal utility of income.” Bojer, *Distributional Justice*, p. 24.

¹³ Nussbaum, *WHD*, pp. 61–65; Amartya Sen, “Capability and Well-being,” in *The Quality of Life*, edited by Amartya Sen and Martha Nussbaum, (Oxford: Oxford University 1993); Rawls, *A Theory of Justice*, p. 157. Rawls argues that we need both an efficiency principle, and a *difference principle* (i.e. that no one should be worse off due to efficiency; or that no one should be mere means for others.)

¹⁴ It is here relevant to note that some utilitarian and welfarist thinkers have a more nuanced view on people’s choices and subjective reports about well-being. Nussbaum points especially to John Harsanyi in this respect, and in Nussbaum, *SSJ*, p. 150, she quotes him as saying, “Any sensible ethical theory must take a distinction between rational wants and irrational wants, or between rational preferences and irrational preferences. It would be absurd to assert that we have the same moral obligation to help other people in satisfying their utterly unreasonable wants as we have to help them in satisfying their reasonable desires.” But the problem of an external moral standard still remains. Indeed, even Harsanyi – claiming as he does that the ultimate criterion of good and bad is people’s own true preferences – apparently has no way of distinguishing between rational and irrational, or antisocial and social.

efficiency is the primary goal, it would not be rational to re-distribute to either A or B. Regarded from the perspectives of Rawls, Sen and Nussbaum it is, firstly, counterintuitive that the two subjects should count as the same; and, secondly, it seems unjust that only marginal utility should be the guiding factor for redistribution. The ethical problems of utilitarianism are many, and I will not address all of them here. Later on (3.2), however, the phenomenon of *adaptive preference formation*¹⁵ will be discussed more thoroughly. As a reaction to the normative inadequacy of utilitarian welfare theory Rawls calls for a more balanced theory of justice; and Sen and Nussbaum call for a distribution accommodating actual needs and equal opportunities.

2.2 John Rawls's Justice as Fairness

Rawls's conception of *justice as fairness* differs in several fundamental respects from conceptions of utilitarian welfare theory. First and foremost, Rawls extracts his principles of justice and distribution from the *original position*.¹⁶ In the original position Rawls places the partakers under moral constraints in form of a *veil of ignorance*. The veil of ignorance imposes epistemological constraints on the partakers; leaving everyone with the same "bargaining power" as the normative result (i.e. the partakers are ignorant of their own accidental properties, including, sex, age, ethnicity, social and economic status). In contrast, under a standard utilitarian theory, the partakers know their own situation, and it is their preferences alone which will determine the standards of distributive justice. From Rawls's perspective, then, this is insufficient because it is impossible to distinguish normatively between the "rich and powerful" person with extravagant preferences, and the poor and disabled person who needs an equal amount of resources to achieve the same amount of welfare. Rawls's aspiration, on the other hand, is that if one imposes moral and epistemological restrictions on the partakers,

¹⁵ Meaning that in which "[...] an individual's preferences are shaped in accord with the (frequently narrow) set of opportunities she actually has." Nussbaum, *SSJ*, p. 151.

¹⁶ As will be discussed later (3.2.3), Nussbaum is critical towards Rawls's *proceduralism*.

[...] assuming that the original position does determine a set of principles (that is, that a particular conception of justice would be chosen), it will then be true that whatever social institutions satisfy these principles those engaged in them can say to one another that they are cooperating on terms to which they would agree if they were free and equal persons whose relations with respect to one another were fair.¹⁷

The procedural and moral constraints that determine the concept of justice as fairness are in clear contrast to utilitarian philosophy. In a strict welfarist regime moral conceptions stemming from other sources than people's preferences are illegitimate. Rawls, on the other hand, imposes moral restrictions on people's preferences so as to make sure the system is *fair* and everyone has the same opportunity at pursuing their idea of a good life. And, he presumes, the partakers in the original position would end up choosing two basic principles of justice: *a principle of equal liberty* and *a principle of efficiency and distribution*.¹⁸

Rawls gives his principle of equal liberty *lexical priority*¹⁹ over his second principle – that of efficiency and distribution. The first principle reads as follows: “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.” The second principle is formulated in this way, however: “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage [i.e. to the benefit of the least advantaged] and (b) attached to positions and offices open to all.”²⁰ In contrast to the

¹⁷ Rawls, *A Theory of Justice*, p. 12.

¹⁸ For simplicity I have chosen to give the principles these two names. They are not Rawls's own conceptions.

¹⁹ *Lexical priority*, or *lexical order*, is used by Rawls in the following sense: “This is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception.” The definition is taken from *A Theory of Justice*, p. 38. In essence his point is this: a basic liberty can never be compensated for by anything else than another basic liberty.

²⁰ Rawls, *A Theory of Justice*, p. 53. My addition in the brackets.

utilitarian, who has little regard for deontological principles and would let efficiency and welfare optimisation trump most other aspects, Rawls uses the first principle as a categorical imperative. No matter what else is prioritized the principle of equal liberty cannot be compromised. In a case where a very efficient economic system would lead to great wealth or welfare; this could never be just if it entailed a degradation of citizens' liberties (principle 2 could never overrule principle 1). Similarly, if an inequality in distribution would benefit the society at large, but make the least well off worse off than if everyone received the same, this would not be deemed a just distribution (under principle 2, the benchmark of a just distribution is that the worst off should benefit from inequalities in distribution).

A third, central aspect of Rawls's justice as fairness conception concerns what he calls *primary goods*, "goods [which] normally have a use whatever a person's rational plan of life."²¹ These goods are perceived, among other things, as a necessary basis for rational and ethical reasoning. According to Rawls, primary goods are such resources as rights, liberties, opportunities, income and wealth, and the social basis of self-respect. They are also such as health, vigour, intelligence and imagination.²² Yet these latter types of goods are *natural* primary goods and cannot, Rawls claims, be subject to distribution. Only *social* primary goods can be distributed. On this point, the capabilities approach diverges fundamentally from Rawls's theory. Both Nussbaum and Sen find he represents a misguided *resourcism*, where all differences of opportunity can be resolved through redistribution of income and wealth. Nussbaum formulates what she regards as Rawls's problem in the following manner: "To treat A and B as equally well-off because they command the same amount of resources is, in a crucial way, to neglect A's separate and distinct life, to pretend that A's circumstances are interchangeable with B's, which may not be the case."²³

²¹ John Rawls, *A Theory of Justice*, revised edition (Oxford: Oxford University Press, 1999), p. 54.

²² Rawls, *A Theory of Justice*, p. 54.

²³ Nussbaum, *WHD*, p. 69.

Amartya Sen's critique of Rawls's *primary goods* was first formulated in his Tanner Lecture "Equality of What?" where he claims that Rawls's "fetishism" with goods suffers from the fact that it "is concerned with good things rather than what these good things *do to* human beings."²⁴ Sen therefore suggests a different approach. And he defines "the approach [as] based on a view of living as a combination of 'doings and beings', with quality of life to be assessed in terms of the *capability* to achieve valuable functionings."²⁵

On a more fundamental level the capabilities approach criticises Rawls's original position for not being attuned to the plurality of people's physical circumstances.²⁶ The proponents of the capabilities approach would prefer to revise Rawls's methodology so it would be more attuned to the plurality of human capabilities and give more focus to *natural primary goods* as an essential distribuendum.²⁷

2.3 Nussbaum – Lists and Global Justice

The capabilities approach can be read as both a continuation of, and a reaction to, the two positions set out above. Sen and Nussbaum agree, in most part, about what an alternative theory should cover. In respect of whether the capabilities standards should be explicated, however, they differ. In the following I will present the most essential aspects of Nussbaum's capabilities approach. This will hopefully serve as a background for the analysis and more critical expositions in the following chapters.

²⁴ Amartya Sen, "Equality of What?," in *Equal Freedom*, edited by Stephen Darwall, Selected Tanner Lectures on Human Values, (Michigan: The University of Michigan Press, 2000), p. 328.

²⁵ Sen, "Capability and Well-being," p. 31.

²⁶ There will be more on this criticism under 2.4.4.

²⁷ In Sen, *The Idea of Justice*, pp. 11–12, Sen also poses a similar, but more general, critique against Rawls. This regards what he calls Rawls's *transcendental institutionalism*. Sen argues that Rawls, at least in his early writings in *A Theory of Justice*, is too rigid and idealistic in proposing a hypothetical original position which leads to only one conception of justice (i.e. the two principles mentioned in 2.3 in this thesis). Sen finds it more plausible that we would find many differing conceptions of justice morally adequate. Instead of being committed to *one* principle, formed as a transcendental agreement, Sen is of the opinion that the principles must be formed through discussions and public reason.

2.3.1 The List

Nussbaum finds that both the utilitarian and Rawls's resource-based approach have serious shortcomings. In addition, she sees Sen's capabilities approach as too vague insofar as it omits to list any specific capability standards. Nussbaum, therefore, specifies a list of "Central Human Functional Capabilities" which she claims all human beings need as a minimum requirement – i.e. they represent a threshold level beneath which truly human functioning is not available.²⁸ The functional capabilities can also be seen as something similar to basic human rights. While Rawls and Sen²⁹ both prioritise freedom and autonomy, Nussbaum appeals to conceptions like *human dignity*, *human flourishing* and *to live in a truly human way*.³⁰ To attain a life above the minimum threshold, you need access, Nussbaum says, to at least the following ten functional capabilities:

1. **Life.** Living a normal length life.³¹

²⁸ Nussbaum, *WHD*, p. 6.

²⁹ "Sen has explicitly endorsed the priority of liberty." Nussbaum, *WHD*, p. 12. Nussbaum claims that all the capabilities are just as important for dignity and human flourishing.

³⁰ Jane Flax has responded to Nussbaum's use of the term "truly human." It reveals, she believes, an implicit and essentialist teleology, "in which nature, purpose, end, and good are intertwined." According to Flax, this view presupposes that an understanding of human nature can provide us with normative information about its purpose and end. Jane Flax, "On Encountering Incommensurability: Martha Nussbaum's Aristotelian Practice," in *Controversies in Feminism*, ed. James P. Sterba (Lanham, Maryland: Rowman & Littlefield Publishers, 2001), p.38. For Nussbaum's direct reply to this critique see: Martha C. Nussbaum, "Essence of Culture and a Sense of History," in *Controversies in Feminism*, ed. James P. Sterba (Lanham, Maryland: Rowman & Littlefield Publishers, 2001), pp. 59–67. Also, In *WHD*, p. 73, Nussbaum claims that the boundary – between a person and someone who is not really a human being – is something that she is not very interested in. She is more concerned with the higher threshold, and what is *worthy* of a human being. In Nussbaum, *WHD*, pp. 76–77, she denies that her use of "truly human" is in any way a teleological or metaphysical conception. Nussbaum's emphasis on disabilities, animal dignity, and "the problematic Kantian split between personhood and animality" in *FJ*, p. 132, can also be read as a response to the mentioned normative critique.

³¹ Nussbaum, *WHD*, p. 78–80. The specifications and examples in the list are paraphrased, not quoted.

2. **Bodily Health.** Good health (e.g. reproductive health, nourishment and adequate shelter.)
3. **Bodily Integrity.** Freedom of movement and freedom from physical assault. (Also, having opportunities for sexual satisfaction and choice in matters of reproduction.)
4. **Senses, Imagination, and Thought.** To act in a truly human way through for instance intellectual and artistic expression.³²
5. **Emotions.** Being capable of for instance love, grief and longing. To have an emotional development not blighted by neglect or abuse.
6. **Practical Reason.** Critical reflection regarding one's own plans and ideas of the good life.
7. **Affiliation.** A) To live with and toward others. To have sympathy and empathy for them. To protect the freedom of assembly and political speech; and B) to have the social basis of self-respect. To be treated with equal dignity and non-discrimination.
8. **Other Species.** To live with concern for other animals, plants and life forms.
9. **Play.** To laugh, play and enjoy recreational activities.
10. **Control over One's Environment.** A) Political (to participate effectively in political choices);³³ and B) Material (to hold property).

The list is founded on two basic suppositions, says Nussbaum. First, there are certain functions that are central to human life, meaning that one could not exist without the providing capabilities. Second, drawing on Marx and Aristotle, she claims there are certain ways of functioning that are “truly human.” The aspiration of the list is to define the capabilities needed to be *human*; and in a dignified way, not merely an animal way.³⁴ In

³² These capabilities are more timeless than others. Functions like literacy, mathematical and scientific training; musical and artistic expression; self-expression; and self-realization are specifications of a more modern world. Cf. foot note 81, pp. 77–78 in Nussbaum, *WHD*.

³³ Former versions of this list do not include the capability of controlling one's political environment. See: Martha C. Nussbaum: “Human Functioning and Social Justice, In Defence of Aristotelian Essentialism,” *Political Theory* 20/2, 202–246.

³⁴ Nussbaum, *WHD*, pp. 71–72, 82–83, and 87; and Nussbaum, *SSJ*, p. 40.

her use of what has been understood as comprehensive and “essentialist vocabulary,” she has irked certain philosophers of political liberalism – with whom she otherwise tends to agree. The list is often seen as illiberal in the sense of both expressing and presupposing naturalist,³⁵ or comprehensive, ethical values.³⁶ This being said, Nussbaum does state explicitly that “the list remains open-ended and humble; it can always be contested and remade.”³⁷

Nussbaum’s conceives her list of capabilities as being closely related to human rights, as they are understood in contemporary international discussions.³⁸ In this respect she goes further than Rawls, who in *The Law of Peoples*, does not suggest a comprehensive list of rights as an answer to the challenges of global justice.³⁹ On the other hand, Nussbaum does not make it her prime object to engage in discussions about the challenges of global institutions or legal cosmopolitanism. And she regards the state as the most pragmatic and important site of implementation. It has also been claimed that Nussbaum’s “cosmopolitan moral attitude” stands without any corresponding political practices or institutions.⁴⁰ Nussbaum’s discussion of the importance of institutions in the globalization of the

³⁵ Ad biology and naturalism Nussbaum writes that, it does not “claim to read facts of ‘human nature’ from biological observation; it takes biology into account as a relatively constant element in human experience.” *SSJ*, p. 40. To some this specification might not be satisfactory enough. In Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 67, Nussbaum is explicitly referred to as a “naturalist.”

³⁶ This will be discussed more thoroughly later on.

³⁷ Nussbaum, *WHD*, p. 77.

³⁸ Nussbaum, *WHD*, p. 97.

³⁹ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 50: the requirements for non-intervention are a) a certain fair equality of opportunity at e.g. education; b) a decent distribution of income; c) society as employer of last resort; d) basic health; and e) public financing of and information about elections. There is no focus on equality and non-discrimination between the sexes or religious groups.

⁴⁰ Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), p. 94–95, fn.7.

capabilities approach in *Frontiers of Justice*⁴¹ can, perhaps, be regarded as a response to this type of critique.

2.3.2 Universal Capabilities – Contextualized Functions

The utilitarian regards social justice as the maximization of total, or average, happiness and utility. For Rawls the key to social justice is the distribution of primary goods needed to pursue rational plans of life. Social Justice, according to Nussbaum, however, entails that each person has sufficient capabilities. It is not the equality of resources or utility which matters, but that everyone has an actual ability to lead a dignified and truly human life.

The distinction between *capability* and *function* is essential to Nussbaum's philosophy: being capable of something does not necessarily require one to actualize the corresponding function. The paradigmatic example used by Nussbaum is that if you have access to nutritious food you have the capability of relieving your hunger and attaining energy. You should, however, have the possibility to refrain from actually eating. If for religious purposes you want to fast, this is something completely different than starvation because you don't have access to food.⁴² The difference between capability and function is that between the *ability* to do something, and the actual *being* or *doing*.

The central goal of public planning should, according to Nussbaum, be to provide for equal and sufficient *capabilities*, but not to make sure that everyone actualizes the corresponding functions. The first entails an enhancement of freedom, while the second could lead to paternalism and a limitation of freedom. To Nussbaum, the distinction between capability and function, where only the first can be subject to public planning, is one of the preconditions of cultural sensitivity in the implementation of the "Central Human Functional Capabilities." Where the capabilities are basic and universal, the realization of the functions can take many different forms. Nussbaum exemplifies this by stating that in

⁴¹ Nussbaum, *FJ*, p. 298–325.

⁴² This and similar examples can be found in Nussbaum, *WHD*, p. 87, and Nussbaum, *SSJ*, p. 45.

respect of the capability for play, “a Finn may interpret play and recreation in terms of a comprehensive conception of life in which solitary contemplation in the forest plays a large role; a resident of Calcutta is likely to have a different set of comprehensive associations in mind.”⁴³

There are however, several complicating factors making this distinction less clear cut than it seems. According to Nussbaum the capabilities can be divided into three groups, according to how they are “implemented.”⁴⁴ There are *basic capabilities*, like sense and the capability for speech; these are innate, i.e. potentials we as human beings are born with. Second, there are *internal capabilities* like freedom of speech and religion or the ability to function sexually. And finally there are *combined capabilities*⁴⁵ “which may be defined as internal capabilities *combined with* suitable external conditions for the exercise of the function.”⁴⁶ But where does one draw the line between “suitable external conditions” and deliberate and paternalist “nudgings” towards the development or priority of certain functions? In the continuation of this problem is the challenge of assessment – it is easier to measure a function than a capability.⁴⁷ A second dilemma concerns what to do when adult persons “sign away from a major capability in a permanent way.”⁴⁸ Does society have a moral obligation to protect people from extreme and lethal self-destruction? If the answer is

⁴³ Nussbaum, *WHD*, p. 76.

⁴⁴ Nussbaum, *WHD*, p. 84.

⁴⁵ In earlier writings Nussbaum referred to these as *external capabilities*. She changed it to *combined capabilities* because she in reality did mean to suggest the appropriate combination of internal and external capabilities. See note 94, p. 84, in *WHD*.

⁴⁶ Nussbaum, *WHD*, p. 84–85.

⁴⁷ For interesting views on measurement and evaluation, see Sen, “Capability and Well-being.” Nussbaum, being more concerned with philosophical and normative implications of the theory, does not discuss this at any length.

⁴⁸ Nussbaum, *WHD*, p. 93.

yes, then how do we know when it is correct for a society to intervene? Nussbaum believes such questions should be left to the deliberative process of each nation.⁴⁹

2.3.3 Two Orienting Principles

Situating herself in the tradition of political liberalism, Nussbaum proposes two principles that should regulate the relationship between social and political institutions and individuals.⁵⁰ The first she suggests is very similar to the second Kantian categorical imperative. It is what she calls the *principle of each person as end*. It should be regarded, I believe, as a corrective to both the welfare aggregation in utilitarianism *and* Rawls's political liberalism. Rawls does not make it clear in his analysis of the family whether his two principles of justice are valid in this particular sphere. Nussbaum takes her inspiration from Marx as much as from Kant, in regards of her first principle. According to Nussbaum,

Marx was departing from Kant in some important respects, by stressing (alongside with Aristotle) that the major powers of a human being need material support and cannot be what they are without it. But he also learned from Kant, and his way of expressing his Aristotelian heritage is distinctly shaped by the Kantian notion of the inviolability and the dignity of the person.⁵¹

Nussbaum draws on principles where Marx combines his central idea of exploitation – that it is wrong to subordinate individuals to means, for the ends of others – with his notion of our need for material support to be “truly human.” She therefore re-articulates the *principle*

⁴⁹ Nussbaum, *WHD*, p. 95. However, as I will argue later on, I am not sure whether such a process will be given authority under the perspective of Nussbaum's approach.

⁵⁰ Kjersti Fjørtoft claims that if Nussbaum's theory was a theory of deliberative democracy, these two principles could have functioned as substantial regulations of public debate and deliberation. She compares the application of the two principles to Rawls's view, according to which the public discussion should be regulated by the values expressed in “justice as fairness.” She goes on to ask rhetorically if Nussbaum's normative principles could actually serve the same purpose, noting their grounding in a normative (i.e. comprehensive) idea about human nature. Kjersti Fjørtoft, “Martha Nussbaum om feminisme og politisk liberalisme,” *Tidsskrift for kjønnsforskning* 2007, 2: 55–70, p. 66.

⁵¹ Nussbaum, *WHD*, p. 73.

of each person as end in the following way: it is the principle of each person's *capability* which matters, and the capabilities sought are sought for *each and every person*.⁵²

Nussbaum calls her second principle the *principle of moral constraint*.⁵³ Even if it is the protection of each *individual's* capabilities that matters most, Nussbaum also sees the necessity of protecting different groups and associations. These are typically such as families,⁵⁴ religious groups and other arenas where deep emotional bonds and ideas about the good life are constituted. These arenas can perhaps be seen as society's most important sites of meaning. According to Nussbaum, securing people's capabilities of for instance emotions, love and care, practical reason, affiliation and play presupposes arenas where they can develop without the restriction of political regulation. On the other hand, these groups only deserve protection if they actually facilitate the growth of each of these capabilities. A family reigned by violence does not deserve protection as a family, because it serves the opposite purpose of what it really should. It is in this respect the groups are protected, but also subject to *a principle of moral constraint*.⁵⁵

While the two principles are fairly abstract, they can, in my opinion, still act as consistent guides in the solution of practical dilemmas. This is because, as Nussbaum claims, "like all

⁵² Nussbaum, *WHD*, p. 74.

⁵³ For a more comprehensive description of this second principle read Fjørtoft, "Martha Nussbaum om feminisme og politisk liberalisme," p. 65. For further discussions of this principle in relation to religion and the family see Nussbaum, *WHD*, pp. 187–198, and for discussions of Rawls and the family see, pp. 270–283.

⁵⁴ They can be traditional and untraditional family units. Nussbaum does not give normative priority to the traditional heterosexual nuclear family. As long as the unit can nurture children and be an arena for intimate love and care it serves its purpose.

⁵⁵ I am still undecided as to whether Nussbaum should be read as actually defending group rights, as long as these groups are internally liberal, or if she is consistently individualist and rejects any form of *multiculturalism* whatsoever. If the latter is the case, she would seem to be in agreement with the views of Susan Moller Okin, "Is Multiculturalism Bad for Women?," in *Is Multiculturalism Bad for Women?*, edited by Susan Moller Okin, Joshua Cohen, Matthew Howard and Martha C. Nussbaum (Princeton: Princeton University Press, 1999), p. 7–27.

the central capabilities, religious capabilities are capabilities of individual people, not, in the first instance, of groups.” Even though the religious and affiliative functions often are played out in groups “the capabilities involved are important *for each*, and it is *each person* who should be allowed access to these capabilities.”⁵⁶ Some would maybe see Nussbaum confronted by a *liberal dilemma*⁵⁷ in her application of the principle of moral constraint: authorities should refrain from regulating the internal business of religions, groups and families. In my opinion, however, saying a liberal principle should have a factual impact on the priority of rights between people is not the same as saying the principle is biased or inconsistent.⁵⁸ Furthermore, in *Women and Human Development* Nussbaum urges us to “understand and respect the plurality and diversity of voices in each religious tradition, both traditional and critical, both male and female. This entails being sceptical from the start of any account that fails to recognize the complexity both of religion and of women’s interests.”⁵⁹ Nussbaum perceives cultures as diverse, dynamic, and apt to change, rather than static and monolithic. From this perspective a conflict between, for instance, religion and individual freedom is perhaps not as obvious as many would seem to think.

2.3.4 Neglected Groups

Martha Nussbaum offers what some critics have called too specific and value laden a conception of the human good. This might be so, but at the same time it is striking how much of her work is dedicated to critical analysis of traditional definitions of what constitutes the ideal moral agent.

Present in almost all of Nussbaum’s political philosophy is the feminist perspective. Her approach is universal, but, as I see it, the “benchmark” of validity – in relation to her own

⁵⁶ Nussbaum, *WHD*, p. 188.

⁵⁷ Hans Skjervheim has another articulation of the dilemma: “when the liberal ideals are made absolute, it turns into something illiberal.” “[...] når dei liberale prinsippa vert sette absolutt, forvandlar det heile seg til illiberalitet.” See “Det liberale dilemma,” in *Filosofi og dømmekraft* (Oslo: Universitetsforlaget, 1992) p. 192. My translation.

⁵⁸ Cf. Cathrine Holst, “Det liberale dilemma?,” in *Nytt norsk tidsskrift* 2006, No. 2: 107–115, p.112.

⁵⁹ Nussbaum, *WHD*, p. 188.

or other philosophical theories – is still whether they are capable of incorporating women’s perspectives. A large portion of the criticism in this respect has been directed at the political philosophy of her closest ally John Rawls. As I have already mentioned, Nussbaum is not an ally of Rawls in his view of the family. Rawls acknowledges the family as an essential part of the basic structure of society, but remains unclear to what extent he places it under the scrutiny of his two principles of justice, or under *moral constraints* as Nussbaum could say.⁶⁰ In relation to the family, I also find it interesting to see how Nussbaum’s capabilities approach considers the moral status of children. For Rawls, the principles of justice should not tell us how to raise our children.⁶¹ For Nussbaum, on the other hand, “functioning in childhood is necessary for capability in adulthood.”⁶² To be sure, some of this will be the responsibility of the parents. But in cases of neglect and abuse, for example or the absence of important capabilities, the state has a legitimate role to play in terms of prevention, says Nussbaum.

Nussbaum is at also odds with traditional political philosophy in that she explicitly discusses moral dilemmas concerning women’s bodies and situations. She discusses, for example, genital mutilation, prostitution, and sexual capability.⁶³ Nussbaum also argues for the “intelligence of emotions”⁶⁴ – a perspective which liberalism has marginalized as private, unpredictable and gender specific. Consistent with her Aristotelian spirit, she argues for a cultivation – or *public education* – of moral capabilities like compassion: “Public education at every level should cultivate the ability to imagine the experiences of others and to participate in their sufferings.”⁶⁵ Nussbaum’s feminist contributions are both

⁶⁰ Nussbaum, *WHD*, p. 270–283.

⁶¹ Rawls, “The Idea of Public Reason Revisited,” p. 470.

⁶² For more on children and their specific capabilities, see Nussbaum, *WHD*, p. 90.

⁶³ Nussbaum, *SSJ*, see especially pp. 118–130 and 276–299.

⁶⁴ Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, 8th printing, (Cambridge: Cambridge University Press, 2008).

⁶⁵ Nussbaum, *Upheavals of Thought*, p. 426.

comprehensive and convincing; and in the tradition of liberal political philosophy, in which she places herself, her arguments can seem quite controversial.

In a critical exposition of social contract theory, in *Frontiers of Justice: Disability, Nationality, Species Membership*, Nussbaum identifies three problems of justice left unresolved by the tradition. Certain groups are excluded in social contract theory, and the same is true of Rawls's theory of justice. According to Nussbaum, the problem goes to the core of Rawls's theory insofar as his original position conflates "two questions that are in principle distinct: 'By whom are society's basic principles designed?' and 'For whom are society's basic principles designed?'"⁶⁶ The parties in the original position are free and equal citizens, for whom it both is possible and necessary to engage in a social contract. Some groups are, then, excluded from the social contract because they cannot be free and equal on the same premises as these "equal citizens." The neglected groups, or "three problems of justice" concerned here, are, according to Nussbaum, disabled people (also, children and elderly people); people of other nationalities; and non-human animals. Disabled people and non-human animals lack the rational and normative ability Rawls sets as the standard for partakers of the social contract. And non-nationals can, according to Nussbaum, be seen as excluded because "social contract theories take the nation state as their basic unit."⁶⁷ Given these premises it is difficult to see how those designing the basic principles of justice could effect the inclusion of the three neglected groups because it would not be necessary (i.e. beneficial) or perhaps even possible, to engage with them in a social contract. So when certain groups' perspectives are excluded from the original

⁶⁶ Nussbaum, *FJ*, p. 16. Nussbaum does note on p. 17, however, that Rawls puts things slightly different in *Political Liberalism* than in *A Theory of Justice*. In *Political Liberalism* the parties in the original position are representatives for citizens. According to Nussbaum, however, this difference does not render her critique irrelevant. This because the citizens are supposed to represent are in all essential respects similar to the ones that represent them.

⁶⁷ Nussbaum, *FJ*, p. 92. She does not refer explicitly to Rawls here, but claims that social contract theories, "[f]or reasons internal to the structure of such theories, [...] are bound to do so."

position (from the “by whom”), they are also in danger of being excluded from society’s standards of justice (from the “for whom”).⁶⁸

Nussbaum regards Rawls’s “circumstances of justice” as an inadequate perception of human morality. Therefore, she suggests a different conception: “By contrast [to Rawls], the capabilities approach takes its start from the Aristotelian/Marxian conception of the human being as a social and political being, who finds fulfilment in relations to others.”⁶⁹ Hence, to engage in a political and just community is not to act artificially – as social contract theory might see it – but something humans do naturally. And for the capabilities approach the ethical motivation should not be restricted to others like us, or only to other humans. Again referring to Aristotle, Nussbaum says “The approach is animated by the Aristotelian sense that there is something wonderful and worthy of awe in any complex natural organism – and so it is all ready, in that spirit, to accord respect to animals and recognize their dignity.”⁷⁰

⁶⁸ A similar “warning” can be raised against the discourse theory of Jürgen Habermas, see: Arne Johan Vetlesen, “Habermas og Levinas: I hver sin verden?,” in *Menneskeverd og ondskap: Essays og artikler 1991–2002* (Oslo: Gyldendal, 2003), p. 110: Vetlesen warns Habermas to be careful not to conflate the conception of the *moral agent* with that of the *moral addressee*. On the other hand, as Vetlesen points out, the basic perception of human morality, for Habermas, is our vulnerability and social dependency. This would, then, be more consistent with the views of Nussbaum.

⁶⁹ Nussbaum, *FJ*, p. 85. My addition in the brackets.

⁷⁰ Nussbaum, *FJ*, p. 93–94. Nancy Fraser claims that Nussbaum in this respect suggests a *principle of humanism*. Fraser contrasted this to the *membership principle*, where i.e. national membership is key to defining the “who” of political/moral inclusion. “Seeking a more inclusive standard, they [Nussbaum’s fellow partisans] propose to resolve disputes concerning the ‘who’ by appealing to criteria of personhood. For them, accordingly, what turns a collection of individuals into fellow subjects of justice is common possession of distinguishing features of humanity, such as autonomy, rationality, language use, capacity to form and pursue an idea of the good, or vulnerability to moral injury.” Nancy Fraser, “Abnormal Justice,” in *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009), p. 64. My addition in the brackets.

In my view, Nussbaum's capabilities approach and list of "Central Human Functional Capabilities" provide several important correctives to prevailing conceptions of social justice. Much of her political philosophy is, admirably, dedicated to such fundamental presuppositions for human life and development as are often taken for granted by other theories. In the following chapter, however, I ask whether Nussbaum's approach can be regarded as sufficient.

3 Social Justice and Justificatory Resources

What normative justificatory resources⁷¹ can the capabilities approach provide us with as a response to such differing challenges as cultural pluralism and adaptive preferences? This is the main question posed in the present chapter. I seek to answer it by way of two separate discussions. First, I consider one of the criticisms commonly raised against Nussbaum's approach: that it is at odds with its liberal commitment, at least in its application of the Rawlsian concept of *overlapping consensus* (3.1). Second, I take a closer look at Nussbaum's critique of utilitarianism and its justification, exemplified by the case of *adaptive preference formation* (3.2). In the latter discussion, I also focus on Nussbaum's renunciation of procedural alternatives (3.2.3).

3.1 A Comprehensive Doctrine?

Ever since Nussbaum began publishing her ideas in the field of social justice she has received a great amount of attention – both supportive and highly critical, and from liberalist and feminist philosophers alike. Much of the commentary literature addresses her strong defence of universal values – i.e. universal accommodation of human capabilities – as the answer to what she regards as the most pressing global challenges to social justice. While this can be seen as giving her approach a particular moral force in countering unjust social power, it has also attracted charges of essentialism and paternalism. In several ways she is seen as departing from her liberalist framework, and hence labelled as *illiberal*. Nussbaum has especially been coined as illiberal due to the *ethical comprehensiveness* of her premises – i.e. her approach presupposes too substantial a definition of human

⁷¹ In this thesis *justificatory resources* are meant to denote both, 1) the ethical or normative resources one uses to establish standards of justice; and 2) the resources one applies in evaluating the moral *acceptability* of the standards proposed. The definition presupposes that needs, entitlements, and interpretations of justice, at least to some extent, varies over time and in different cultures. The relationship between justification and *application* is therefore significant. Cf. Habermas, *Justification and Application*, p. 35, 37, 128.

functioning and the human good. This is at odds with the principles on which most liberal theories rely, where ethics, religion, or *ideas about the good life* are private matters. They cannot be agreed in the same way as moral *principles regarding the right and just*.⁷² The latter are formal principles regulating our public and political coexistence, while the former are substantial convictions guiding our private life choices. If we believe a liberal like Rawls, the second idea can never be subject to normative and universal agreement.⁷³ Amartya Sen has similarly argued that it is not in a philosopher's place to propose universal and fixed lists of central human functions.⁷⁴ The problem, Sen argues,

is not with listing important capabilities, but with insisting on one predetermined canonical list of capabilities, chosen by theorists without any general social discussion or public reasoning. To have such a fixed list, emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why.⁷⁵

That many universal conceptions of what constitutes the human good have been “insular in an arrogant way and neglectful of differences among cultures and ways of life,” is not

⁷² A common conceptual distinction used in this respect is that between *ethics* and *moral*. Jürgen Habermas has formulated the distinction as follows: “In ethical-existential discourses reason and the will condition one another reciprocally, though the latter remains embedded in the life historical context thematized. Participants in processes of self-clarification cannot distance themselves from the life histories and forms of life they actually find themselves. Moral-practical discourses, by contrast, require a break with all of the unquestioned truths of an established, concrete ethical life, in addition to distancing oneself from the contexts of life with which one's identity is inextricably interwoven.” Habermas, *Justification and Application*, p.12. Ethics is often associated with Aristotelian and Hegelian perspectives, morality with Kantian maxims.

⁷³ John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press 2005), pp. 133–173.

⁷⁴ For Sen's criticism on this see Amartya Sen: “Capabilities, Lists and Pubic Reason: Consulting the Conversation,” in *Amartya Sen's work and ideas – A gender perspective*, edited by Bina Agarwal, Jane Humphries and Ingrid Robeyns, (London: Routledge 2005) pp. 335–338.

⁷⁵ Sen, “Capabilities, Lists and Pubic Reason: Consulting the Conversation,” p. 335. Although I think Sen underestimates the value of philosophical and ethical reflection about human nature; I think he has a point about the importance of a public debate.

denied by Nussbaum.⁷⁶ Aristotle, for one, excluded women from his ontology of the “ultimate human being;” and because he saw the political as a *sine qua non* of human nature, he excluded women from the political sphere too. On the other hand, there are also examples of libertarian and liberal political philosophers who, because they *lacked* a conception of human nature, excluded women from the political sphere. There is a need for universal concepts explicating which rights, values, moral standards et cetera are necessary for the dignity of all human beings, Nussbaum insists. From a feminist perspective it is at least important that the definition of needs or rights is not entrusted to the contingencies of a capitalist market or the private sphere; which all too often are regulated by conservative approaches to power or patriarchal cultures. I find this an important argument to keep in mind.⁷⁷ In the case of Aristotle, Nussbaum says, “it could be plausibly argued that it would have been even easier to exclude women and slaves on a whim if one did not have such a concept to combat. [... So, at this point] we need to examine a real proposal, both to display its merits and that it can in fact answer these charges [i.e. regarding neglect and exclusion].”⁷⁸ I read Nussbaum’s line of reasoning on this point as a response to utilitarianism, but also to Rawls’s reluctance to include the family under the regulation of his two principles of justice⁷⁹; and to Sen’s lack of specified capabilities, as well as his avoidance to give “explicit arguments against relativism.”⁸⁰ I also consider Nussbaum’s *positive explication* of requirements for human functioning as a bold, feminist contribution to the debate about social justice.

⁷⁶ Nussbaum, *SSJ*, p. 39.

⁷⁷ However, as will be discussed in later on, I don’t think Nussbaum’s capabilities approach has sufficient internal resources to criticize her own conception of “the human good.”

⁷⁸ Nussbaum, *SSJ*, p. 39. My clarifications in the brackets.

⁷⁹ On this point, Rawls is perhaps more unclear about than strictly “against” letting the family come under the two principles of justice. But the result can in any respect be that distribution within the family remains unregulated, even if the family is seen as a part of the basic structure of society. See Rawls, “The Idea of Public Reason Revisited,” in *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005), p. 468: “The principles of political justice are to apply directly to [the basic structure of society], but are not to apply directly to the internal life of the many associations within it, the family among them.”

⁸⁰ Nussbaum, *WHD*, p. 13. For more on the differences between Sen and Nussbaum, see pp. 11–15.

In spite of the alleged essentialism, Nussbaum does claim that her capabilities approach, can be justified universally through *an overlapping consensus* – as described by Rawls.⁸¹ Rawls introduces the concept as an answer to the question: “how is it possible that there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines?”⁸² And, in Rawls’s political liberalism an overlapping consensus serves as the appropriate democratic and institutional legitimacy for a pluralistic society where citizens adhere to different *reasonable comprehensive doctrines*. According to Rawls, reasonable comprehensive doctrines have three main features: 1) they exercise theoretical reason: they organize religious, philosophical, and moral aspects of human life consistently and intelligibly. 2) They exercise practical reason: they balance and prioritize values in particular ways. 3) They are often results of long traditions and usually they evolve slowly.⁸³ Each doctrine is often inherently consistent, and believed by its adherents to be true, or at least reasonable. An overlapping consensus, then, allows for a plurality of these comprehensive doctrines and accepts their ability to coexist epistemologically and normatively. This coexistence is sustained by *public reason*, and is in this sense more than a mere *modus vivendi*.

In one of the most recent expositions of her relationship to Rawls – *Frontiers of Justice* – Nussbaum explains her deployment of an *overlapping consensus*: “[A]lthough, as a type of political liberalism, [the capabilities approach] eschews reliance on any deep metaphysics of human nature, it does operate with a conception of the person that it develops for political purposes, a conception that can, it is hoped be the object of an overlapping

⁸¹ “By ‘overlapping consensus’ I mean what Rawls means: that people may sign on to this conception as the freestanding moral core of a political conception, without accepting any particular metaphysical view of the world, any comprehensive ethical or religious view, or even any particular view of the person or of human nature.” Nussbaum, *WHD*, p. 76.

⁸² Rawls, *Political Liberalism*, p. 133.

⁸³ For the full definition, see Rawls, *Political Liberalism*, p. 59.

consensus.”⁸⁴ Nussbaum’s conception of the person, and consequently her theory of social justice, is purely political, she assures the reader – it does not pose a truth claim about a particular metaphysical or moral doctrine. If this were the case, she would perhaps be on a par with Rawlsian liberalism. What Nussbaum does, however, is to present a substantial and detailed list of prerequisites for human flourishing. As pointed out by some of Nussbaum’s critics, this is far more comprehensive than Rawls’s proposal. To Rawls “the reason why citizens can agree on a common concept of the person, is that it is restricted to notions of democratic citizenship; and that it is not justified by a particular moral or metaphysical idea about human beings.”⁸⁵ While Nussbaum may not be an *ethical realist* in the metaphysical sense – she does defend an *internal ethical realism*, in philosopher Kjersti Fjørtoft’s view.⁸⁶ In other words, she poses a truth claim in respect of her own moral conception, despite being aware of several other conflicting and incommensurable conceptions. Nussbaum is accordingly both contradicting herself and fundamentally at odds with the Rawlsian liberalism she contends to be aligned with.

In *Political Liberalism* Rawls states,

One of the deepest distinctions between conceptions of justice is between those that allow for a plurality of reasonable though opposing comprehensive doctrines each with its own conception of the good, and those that hold that there is but one such conception to be recognized by all citizens who are fully reasonable and rational.

⁸⁴ Nussbaum, *FJ*, p. 86. My addition in the brackets.

⁸⁵ Fjørtoft, *Martha Nussbaum om feminisme og politisk liberalisme*, p. 67. “Grunnen til at samfunnsmedlemmene kan bli enige om å anerkjenne et felles personbegrep, er at det er avgrenset til å si noe om demokratisk medborgerskap og ikke forutsetter en bestemt moralsk eller metafysisk idé om mennesket.” My translation.

⁸⁶ Fjørtoft, *Martha Nussbaum om feminisme og politisk liberalisme*, p. 67. *Ethical realism* can be defined as a philosophical position which sees ethical propositions as either true or false, and sees moral properties as irreducible to other natural entities. For a more thorough description of ethical realism, see: Alexander Miller, “Naturalism I: Cornell Realism,” in *An Introduction to Contemporary Metaethics*, (Cambridge: Polity Press 2003), pp. 138–140.

One could say that, according to Rawls, Nussbaum's capabilities approach falls on the wrong side of this divide. Even if she claims to accept a plurality of justifications, she can here be read as presupposing that only one conception of the good – her own conception of human functioning – is the one to be universally recognized. The discrepancy between Nussbaum and Rawls can be said to be intensified by the fact that Nussbaum claims her list to be *global*, and not restricted to a modern, democratic welfare state. To Rawls, a global justification of human rights must be made on an even "thinner" basis than provided by political liberalism in a modern democracy.⁸⁷ Nussbaum is clearly aware of this fact, but argues that even from within the conceptions of Rawls's own theory, a universalisation of political liberalism is possible.⁸⁸

The conflict between Nussbaum and Rawls, as sketched out so far, does raise serious questions about the capabilities approach's evident use of the Rawlsian concept of overlapping consensus as a justificatory resource. However, it could be argued, at least some of the capabilities on the list are so basic that no matter what comprehensive grounds Nussbaum might have for suggesting them, the capabilities themselves would achieve universal endorsement.⁸⁹ To be sure, the rights listed in the Universal Declaration of Human Rights⁹⁰ are far more comprehensive. The major difference in this respect, and it is here the matter of justification becomes particularly essential, is that the latter of these two "lists" is not grounded in a deep philosophical doctrine, while the former is. And, at the

⁸⁷ In "Law of Peoples," *Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1999), pp. 551–552, human rights, Rawls states, "do not depend on any particular comprehensive doctrine or philosophical conception of human nature, such as for example, that human beings are moral persons and have equal worth." According to Rawls, *hierarchical states* might reject such principles because they represent western ideas of *liberalism* or *democracy*.

⁸⁸ Nussbaum, *FJ*, pp. 298–305.

⁸⁹ At least capabilities 1–4 seem to constitute a bare physical minimum needed no matter what else one might believe about human nature.

⁹⁰ The Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/> (adopted by the General Assembly of the United Nations (GA) in 1948).

point of revision, specification, or proposition of new rights, this cannot, according to the reasoning in Nussbaum's approach, be justified if it does not correspond to her underlying philosophical theory. Charles Beitz has claimed that, "[a]s any naturalistic theorist must, [Nussbaum treats] the philosophical theory as authoritative for judgements about the proper content of international doctrines. The difficulty is to explain why this should be."⁹¹ This can pose difficulties for the legitimacy of Nussbaum's approach. In the following, therefore, I will discuss whether Nussbaum can draw on other sources of justification in defence of her proposed standard of social justice.

3.2 The Case of Adaptive Preference Formation

The doctor was rightly upset about [the unsanitary conditions in the women's quarters]; but he was wrong in one respect. He thought that it was a source of constant pain for us. Quite the contrary ... To those with low self-regard, neglect does not seem unjust, and so it does not cause them pain [...]⁹²

Nussbaum's approach to social justice is not as the traditional armchair philosopher's. She has gained wide experience from her travels in India; from her meetings and interviews with others; and her extended use of poetry and literature in her work. The quotation above forms the opening of Nussbaum's chapter on *adaptive preference formation* in *Women and Human Development*, and is originally taken from a story by Rabindranath Tagore in a selection of Bengali short stories. I find the epigraph to be especially fitting in an analysis of adaptive preference formation; both due to "the message and the medium" it portrays. Nussbaum's critique of preference based economic welfare theories can, in my view, be seen as a call for ethical interaction with women's lives and realities. In the following I will

⁹¹ Beitz, *The Idea of Human Rights*, p. 67. My addition in the brackets, but Beitz does explicitly refer to Nussbaum in this respect. Originally it reads "these writers treat," then referring to Nussbaum and James Griffin.

⁹² Rabindranath Tagore, "Letter from a Wife," quoted in Nussbaum, *WHD*, p. 111.

analyse Nussbaum's critique and corresponding solution to the problem of adaptive preference formation.

3.2.1 Preference Based Welfarism – Nussbaum's Critique

One of the first analyses of the concept of adaptive preference formation was Jon Elster's in *Sour Grapes*. Elster introduces his chapter on adaptive preferences with the fable of the fox who longed for a cluster of grapes. When the fox realizes they are out of reach he "thinks them sour anyway." Adaptive preferences are therefore also known as the phenomenon of 'sour grapes'. Elster describes adaptive preferences as something that reduces cognitive dissonance between ideal and reality, through resignation and habituation.⁹³ From this perspective, the character in Tagore's story, epigraphed above, can be said to have reduced her cognitive dissonance by a lowering of expectations and sense of self worth. She lives under terrible sanitary conditions, but her reported subjective welfare will not reveal these objective conditions. Another example of how adaptive preferences can be a source of error is one often used by Amartya Sen:⁹⁴ In a 1944 study of widowers and widows in India, 45.6% of the widowers reported their health as "ill" or "indifferent," while only 2.5% of the widows reported their health to be "ill" (none reported "indifferent"). Compared to the real situation, and what one knows about widows' in India – they are often particularly bad off in terms of health and nutrition – this is quite a striking result. It can teach us how "quiet acceptance of deprivation and bad fate affects the scale of dissatisfaction generated, and the utilitarian calculus gives sanctity to that distortion."⁹⁵ And of course, adaptive preference formation could also work in the opposite direction – when over-privileged people are spoiled by luxury and wealth. This would

⁹³ Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality*, (Cambridge: Cambridge University Press 1983), p. 109–140. Adaptive preferences as in the phenomenon of *sour grapes* should not be confused with *preference change through learning*, where the individual has enough information to reflect on the choices, and would therefore not go back to a situation which is worse. Adaptive preference as resignation is reversible, but preference change through learning is irreversible.

⁹⁴ I have taken the example from Nussbaum, *WHD*, p. 139, but the numbers and original example stems from Amartya Sen. The original source is not given by Nussbaum.

⁹⁵ Amartya Sen quoted in Nussbaum, *WHD*, p. 139.

cause a decrease in welfare even if most would say that the “real” loss of life quality is insignificant. In either case it is a serious problem for utilitarian welfare theory because it bases its measurement of total, or average, welfare on individual preferences – or such entities as *subjective welfare* and *utility*. As Elster notes, “for the utilitarian, there would be no welfare loss if the fox were excluded from consumption of the grapes, since he thought them sour anyway.”⁹⁶ As a consequence, utilitarianism can be said to lose its force as a normative approach to social justice.

A concept such as adaptive preference formation touches upon a series of predicaments in political and moral philosophy. Can we take people’s subjective reports about their preferences, desires and choices at face value or are they distorted by their environment? Does not Nussbaum make an essential normative point when she states, “Women and other deprived people frequently exhibit [...] ‘adaptive preferences’, formed under unjust background conditions”? And that “these preferences [...] typically validate the status quo”?⁹⁷ But is this emphasis on habituated preferences – especially amongst unprivileged groups – not paternalist? Does it not smack of educated elites claiming that certain groups vote against their own interests; or that women in third world countries need to be saved by western feminists? How can we know if a preference is “true” or not, and who is epistemically privileged enough to tell? Nussbaum has a clear commitment to the liberalist ideal of individual choice and freedom, and articulates this in the following manner: “for the liberal, choice is the essential issue [...]”.⁹⁸ However, as Anne Phillips tells us, Nussbaum is driven into a curiously liberal illiberalism, and “finds herself in a position where she is simultaneously hooked on the idea of choice and critical of most people’s

⁹⁶ Elster, *Sour Grapes*, p. 109.

⁹⁷ Nussbaum, *FJ*, p. 73. It is interesting how this phenomenon seems to reject all types of *standpoint feminisms* which claim that marginalisation and victimhood can open up for privileged epistemic positions. For an analysis and further criticism of this position, see: Bat-Ami Bar On, “Marginality and Epistemic Privileges,” in *Feminist Epistemologies*, edited by Linda Alcoff and Elisabeth Potter (London: Routledge, 1993), 83–100.

⁹⁸ Nussbaum, *SSJ*, p. 70.

choices.”⁹⁹ In *Women and Human Development*, Nussbaum shows how feminist critique of such phenomena as adaptive preference formation is repeatedly interpreted as authoritarian, and rhetorically connected to discredited terminology as “false consciousness.”¹⁰⁰ But as I attempted to show in my account of Rawls above (2.3), the critique of preference based welfare theory and utilitarianism is equally present in liberalist theories. And to be sure, a philosopher such as Kant would be highly critical of giving such a thing as preference or desire a privileged status in the formation of moral judgements.¹⁰¹

To Nussbaum, the focus on adaptive preference formation is not only a question of moral psychology; *rather it relates in a fundamental way to the formation and justification of political institutions for social justice*. In preference based economic welfare theory – i.e. “the type of welfarism currently dominant in neoclassical economics”¹⁰² – only subjectively reported preferences provide the justificatory grounds for social choice, and, what’s more, a state’s moral and political constitution. And it is the *aggregation* of individual preferences that forms the justificatory platform of a society. The question Nussbaum asks in response to this rival political conception is “under what circumstances are preferences a good guide to such fundamental issues of social choice, and under what conditions might we be justified in departing from or criticizing some of them in the name

⁹⁹ Anne Phillips, “Feminism and Liberalism Revisited: Has Martha Nussbaum Got it Right?,” in *Constellations* Volume 8, No. 2: 249–266, p. 262. Phillips is particularly concerned with the inconsistency of combining a classically liberal emphasis on choice with a feminist understanding of unjust social power. She also points to the predicament of adaptive preference formation.

¹⁰⁰ Nussbaum, *WHD*, p. 114.

¹⁰¹ “An action done from duty has its moral worth, *not in the purpose* to be attained by it, but in the maxim according with which it is decided upon; it depends therefore, not on the realization of the object of the action, but solely on the *principle of volition* in accordance with which, irrespective of all object of the faculty of desire, the action has been performed.” Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (New York: Routledge, 2005), p. 71

¹⁰² Nussbaum, *WHD*, p. 115.

of important norms such as justice and human capability? How should such a justification go?”¹⁰³

3.2.2 Between Subjective Welfarism and Platonism

Nussbaum sketches two contrasting solutions to the problem of adaptive preference formation. One she names *subjective welfarism* – here, all preferences are seen as equally valid and preferences are the only basis for social choice. The second she calls *Platonism*. Here, the preference or desire is seen as irrelevant and unreliable; the goal is to find an objective and independent account of what is just and good.¹⁰⁴ A viable approach to social justice must try to mediate between the two, preserving the good elements and discarding the bad. So while

[w]elfarism springs from respect for people and their actual choices, from a reluctance to impose something alien upon them, or even to treat the desires of different people unequally [...] Platonism springs from an urgent concern for justice and human value, and from the recognition that in the real world these values are frequently subordinated to power, greed, and selfish indulgence.¹⁰⁵

According to Nussbaum, her own capabilities approach represents a viable mean between the two above mentioned positions. She finds it right to reinstate a certain amount of trust in desires and preferences, especially if they are reinterpreted according to her own analysis. Yet preferences cannot constitute the only justificatory ground. Furthermore, she rejects procedural alternatives in solving these problems, but this will be discussed more thoroughly in (3.2.3).

Nussbaum regards the uses of the term ‘preferences’ to be impoverished in the disciplines of both law and economics – in “Flawed Foundations: The Philosophical Critique of (a Certain Type of) Economics” – Nussbaum exclaims: “[w]hat an impoverished repertory of

¹⁰³ Nussbaum, *WHD*, p. 115.

¹⁰⁴ Nussbaum, *WHD*, p. 116–117.

¹⁰⁵ Nussbaum, *WHD*, p. 117.

explanatory entities! Western philosophers, ever since Plato and Aristotle, have agreed that the explanation of action requires quite a few distinct concepts; these include the concepts of belief, desire, perception, appetite, and emotion – *at the very least*.¹⁰⁶ The economic vocabulary fails to capture the complexity of human action and mental life, which according to moral philosopher Jean Hampton, is multi-layered: “individuals have not just preferences, but also preferences about those preferences, and perhaps preferences about those as well.”¹⁰⁷ If economic welfare theory really has an objective of showing respect for people and their choices, it has according to Nussbaum failed. Its oversimplified categories result in a disregard for the complexity of people’s deliberation vis-à-vis their own preferences.

Even if Nussbaum claims that normative standards are necessary – i.e. capabilities – she does not want to underestimate the value of people’s desires and preferences.¹⁰⁸ Nussbaum points to the fact that also philosophers as Thomas Scanlon, can seem to have an oversimplified view on preferences. According to Nussbaum, he has adopted a Kantian conception of desire, which cleaves desire from such faculties as choice and reason. Desire is as such reduced to something “brutish and unintelligent.”¹⁰⁹ Nussbaum, on the other hand – arguing as she does for “the intelligence of emotions” – applies an Aristotelian conception. Desire is hence understood as “[...] a reaching out for ‘the apparent good,’ and thus as involving, even at the level of appetite, a high degree of selective intentionality and responsiveness [...]”¹¹⁰ As a result of this intelligence, desires are perhaps more worthy of our respect than Scanlon seems to think. From Nussbaum’s perspective, a lack of

¹⁰⁶ Martha C. Nussbaum, “Flawed Foundations: The Philosophical Critique of (a Certain Type of) Economics,” in *The University of Chicago Law Review*, 1997 Vol. 64, 1197–1214, p. 1209.

¹⁰⁷ Nussbaum, *WHD*, p. 121. Cf., Harry G. Frankfurt, “Freedom of the Will and the Concept of a Person,” *Journal of Philosophy*, 1971 Vol. 68, No. 1, 5–20.

¹⁰⁸ Nussbaum uses *desires* and *preferences* interchangeably. This is probably because desire is more commonly used in the philosophical literature she refers to, whilst economic literature uses the term preference. In some respects they also denote the same.

¹⁰⁹ Nussbaum, *WHD*, p. 147.

¹¹⁰ Nussbaum, *WHD*, p. 147.

conceptual continuity between emotion and rationality creates a difficulty if desire is to be seen as a part of normative justification.¹¹¹ Desire, Nussbaum claims, should play an important role in *the justification process* of the list of central capabilities. And she suggests a justification procedure which in essence is similar to Rawls's *reflective equilibrium*.¹¹² Here the theoretical list of central capabilities should be tested against cross cultural intuitions about dignity and truly human functioning. In this procedure *informed desire* plays both an epistemic role and an ancillary role in terms of accommodating political agreement and stability.

However, at this point, Nussbaum can seem to be in danger of question begging. After all, she does state that the “substantive values that structure the procedure – [or the reflective equilibrium] – are closely related to the central capabilities on the list, in the sense that some of them, at least seem to be important signs that the resulting judgements are likely to be reliable.”¹¹³ The substantive values she here refers to are such things as equality, freedom from intimidation and desperate want. The capabilities can then be regarded as both the presuppositions for informed desire and as chosen by informed desire. Nussbaum is aware of this fact, and admits that given the adaptive characteristics of desire and preferences, “the arguments from respect of persons seem no better, if people’s desires simply express the background conditions, just or unjust, in which they live.”¹¹⁴ Yet Nussbaum claims there are certain desires that escape this adaptation, because they are permanent; i.e. cannot be removed by the influence of culture and interpretation. These are

¹¹¹ Nussbaum, *WHD*, p. 147–148.

¹¹² Rawls introduces the state of reflective equilibrium – in *A Theory of Justice* p. 17–18 – “as another side to justifying a particular description of the original position.” “By going back and forth, sometimes altering the conditions of the contractual circumstances, at others with drawing our judgements and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both express reasonable conditions and yield principles which match our considered judgements duly pruned and adjusted. This state of affairs I shall refer to as reflective equilibrium.”

¹¹³ Nussbaum, *WHD*, p. 152.

¹¹⁴ Nussbaum, *WHD*, p. 155.

such as desire for food, stability, security, health, and use of reason.¹¹⁵ In other words, it can seem like she is proposing a set of substantial needs that can serve as presuppositions for our informed desires. These are so “thin” and uncontroversial, they are, in a sense, pre-political.¹¹⁶

According to Nussbaum, however, at least two counter arguments arise in terms of giving preferences such an important role in the justificatory process. First, the appeal to basic desires might not be sufficient, because it could be argued that there are “basic desires” that are ethically defective. Intuitively, most of us would have to say that certain (alleged) basic desires, as those involving violence, retribution, or sexual domination, are not normatively on a par with our need for food.¹¹⁷ Second, and this is where the Platonic approach asserts itself, Nussbaum acknowledges that not all higher level preferences are ready to be credited a justificatory power. Nussbaum’s prediction, and best solution to the problem of adaptive preferences, is that an *informed-desire account* (i.e. her revised version of subjective welfarism) and a *substantive-good account* (i.e. Platonism, only replaced by her own list of capabilities) will converge after some time, through the process of a reflective equilibrium. For the time being, though, she says “we had better take our stand squarely in the camp of

¹¹⁵ Nussbaum, *WHD*, p. 155.

¹¹⁶ I don’t think Nussbaum intends her whole list of capabilities to be pre-political, even though this interpretation can be found in certain expositions of Nussbaum’s approach. See: Odin Lysaker, “Menneskelivets kroppslige ukrenkelighet – en minimumsmoral for kosmopolitisk rettferdighet” in *Rettferdighet*, edited by Beatrice Halsaa and Anne Hellum (Oslo: Universitetsforlaget, 2010) p. 157. On the contrary, I find that many of the capabilities only can make sense if they are justified and interpreted politically. And this might even be true in the case of our very “basic desires.” In reality, I think, the boundary between pre-political and political most often is obfuscated. Nancy Fraser has presented the problem as such: The “thin” needs are always and indefinitely nested or connected to ramified chains of “in-order-to” relations. “Moreover, when these chains are unraveled in the course of political disputes, disagreements usually deepen rather than abate.” Nancy Fraser, “Chapter 8: Struggle over Needs: Outline of a Socialist-Feminist Critical Theory of Late Capitalist Political Culture,” in *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Oxford: Polity Press, 1989), pp. 163–164.

¹¹⁷ Nussbaum, *WHD*, p. 156. Nussbaum uses aggression as the main example here.

the substantive good.”¹¹⁸ This, according to Nussbaum, is because “power holds back;” and we cannot wait for optimal convergence before we implement our standards of justice. Given this final conclusion, it seems like Nussbaum, in spite of her detailed analysis of the intentionality of preferences, in reality regards “the Platonic” solution as the only plausible, a position defined by Nussbaum as an “independent account of what is just and good.” Keeping in mind how Nussbaum formulates the problem of adaptive preference formation as a problem vis-à-vis justification – that is, it constitutes an invalid source of normative information – and her question under what circumstances our preferences actually are good guides to such fundamental issues as social justice, I don’t think the (platonic) substantive good approach is a satisfactory answer. This will be further illuminated in the discussion below.

3.2.3 Procedure versus Output

Theories attempting to mend the normative and justificatory deficits of welfarism by an appropriate procedure – those of Rawls and Habermas, as well as Sen and Elster, spring to mind – are characterized by Nussbaum as Janus-faced. On the one hand, the proposed procedures are often so value laden, Nussbaum claims, the aspired “neutrality” is not attained. The procedures incorporate such substantive ethical values, they would be better off if they just began directly from a set of fundamental goals, like in Nussbaum’s capabilities approach.¹¹⁹ But she also criticises them for being too open and insufficient to serve as guarantees against what we with Nussbaum could call “the conservativeness of power.” In this respect they would seem to be charged with the same offences as “subjective welfarism.” A part of the problem, according to Nussbaum, is that men too have adaptive preferences: for many of them the idea of living with an equal is still an intolerable proposition in practice. Even if procedural theories have incorporated Kantian principles such as *the value of each person as end*, Nussbaum regards this as insufficient to counter the factual conservativeness of power. Even love and respect for the worth of the

¹¹⁸ Nussbaum, *WHD*, p. 166.

¹¹⁹ Nussbaum, *WHD*, p. 136.

other will, according to Nussbaum, not necessarily entail recognition of equality. She says, “[...] we have hardly begun to take the measure of the full weight of habit, family and community pressures, and the sheer fear of change, when we think about how men who are not basically evil or sadistic frequently resist such changes, while believing that they do treat women as ends.”¹²⁰ I agree with Nussbaum, one must consider the conservativeness and influence of power. However, this does not mean the question of justification and legitimacy can be overlooked altogether. To round off this chapter, therefore, I shall take a closer look at Nussbaum’s approach to proceduralism, as well as to other possible justificatory sources.

Compatible or not, Nussbaum adopts some of Rawls’s concepts, including *overlapping consensus*.¹²¹ But, in my view, this is a mere “political resource”; it is a tool at the service of agreement and stabilisation. By saying “mere” political I allude to Jürgen Habermas’s understanding and critique of Rawls’s conception of the *political* (without being able to go into an in depth discussions about this dispute here.) Habermas claims that the distinction between *acceptability* and *acceptance* collapses in Rawls’s application of the term political in relation to his overlapping consensus.¹²² I believe Habermas is right. In my view, a *justification*, implies something more – it implies that you have an explanation for how the standards come about, *and* that you can evaluate the moral acceptability of the standards proposed. Some would say Rawls has sufficient mechanisms in his political liberalism to do this. His original position does propose a justificatory outset, and the procedures of public reason can be said to give an extra “level” of justification and evaluation.¹²³ In any

¹²⁰ Nussbaum, *WHD*, p. 162.

¹²¹ Both on national and international level.

¹²² Jürgen Habermas, “Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism.” *The Journal of Philosophy*. Vol. XCII, No. 3, 109–131.

¹²³ As I will discuss below (chapter 4) I don’t regard Rawls’s procedural theory as the best alignment to Nussbaum’s approach. However, I concur with the view whereby “[...] Rawls’s justificatory strategy would be generally preferable to Nussbaum’s – because he sticks to proceduralism, the only viable path given the fact of pluralism, and because his proceduralism is so thoroughly outlined that it constitutes a sophisticated object of assessment.” Holst, “Nussbaum versus Rawls,” p. 115.

case, here the essential difference is that Nussbaum's capabilities approach is outcome-oriented; which means it is the outcome that decides the correctness of the procedure. Another way of seeing the difference between Nussbaum and Rawls, then, is as a disagreement on the priority of procedure and outcome. To Nussbaum, procedure is normatively secondary to outcome. As I already have shown, she has moderate trust in informed desires. The same can be said of the use of deliberation and public reasoning. Nussbaum uses a metaphor to explain her scepticism towards the proceduralist, where the proceduralist is like a cook with a fancy pasta-maker. The proceduralist is confident that any pasta coming out of the machine is good, but the outcome-oriented theorist would rather taste the pasta before giving an opinion.¹²⁴ Now this may sound reasonable enough, but Nussbaum still needs to appeal to some kind of justification. And her trust in desires is too moderate to validate as a justificatory platform. Other justificatory elements Nussbaum can appeal to then are what has been called *the intuition argument* and the *ethical argument*.¹²⁵ The two arguments are closely related. I think it is correct to say that, in a temporal sense, the intuition is primary to the ethical argument, but that normatively it is the other way around. The intuition's validity relies on the ethical evaluation. And ethical conclusions are claimed by Nussbaum to be drawn from ethical premises, not from any further metaphysical premises.¹²⁶

According to some critics, Nussbaum's intuition argument is formed through an appeal to our imagination – where we are asked to imagine a life without the basic capabilities. We will then agree with her that this would be a life without human dignity.¹²⁷ In the introduction to “Justification and Implementation: Democratic Politics” Nussbaum writes, “The account of central capabilities is based on an intuitively powerful idea of truly human functioning that has its roots in many different traditions and is independent of any

¹²⁴ Nussbaum, *FJ*, p. 83.

¹²⁵ Cathrine Holst, “Nussbaum versus Rawls,” in *Nature and Rational Agency*, edited by Siri Granum Carson, Kjartan Koch Mikaelson and Truls Wyller (Frankfurt am Main: Peter Lang Verlag, 2009), p. 104.

¹²⁶ Nussbaum, *WHD*, p. 83.

¹²⁷ Holst, “Nussbaum versus Rawls,” pp. 104–105.

particular metaphysical or religious view.”¹²⁸ I agree. The appeal to moral intuition in this sense seems both strong and unavoidable. A “pure” intuitionism is, however, criticised by Rawls in his *Theory of Justice* as a theory of justification where the weighting between contrasting intuitions and final principles is not taken into account. And, Rawls claims, “if we cannot explain how these weights are to be determined by reasonable ethical criteria, the means of rational discussion have come to an end.”¹²⁹ To Rawls, then, an intuitionist conception of justice is but “a half conception of justice.”¹³⁰ I am not sure if Nussbaum successfully steers clear of this critique, taken that her defence against such criticism is that the balancing of judgments will occur at “a later stage of political choice, after basic constitutional values are fixed.”¹³¹ She can also seem to be claiming that within her capabilities approach the need for balancing between competing ends is unnecessary, because it states its goals definitely, and it positively forbids trade-offs.¹³²

The main argument in defense of Nussbaum’s list is, however, the ethical argument.¹³³ Following Nussbaum’s own reasoning, one could say that similar to basic and other preferences, *intuitions* can also be distorted, and so it is the ethical reflection which serves as the final justification. The ethical argument has its primary source in theoretical reflection – mainly at the theories of Aristotle and Marx – and forms an independent account of the human good. In my view it does not reduce the value of a theory of justice that it takes into account both ontological and ethical values. To be sure, a theory void of ethical reflection would be unsubstantial and not be in touch with our main grounds for normative thinking and motivation. I therefore understand Nussbaum’s focus on ethics and

¹²⁸ Nussbaum, *WHD*, p. 101.

¹²⁹ Rawls, *A Theory of Justice*, pp. 36–37.

¹³⁰ At the same time, I would think no theory of justice could avoid the dependence on intuition entirely.

¹³¹ Nussbaum, *WHD*, p. 212.

¹³² However, as discussed below, such a deflection of the need for “moving parts” – both above and below a certain threshold – does seem both static and unrealistic in my opinion.

¹³³ Holst, “Nussbaum versus Rawls,” p. 104.

values. I also agree with Nussbaum's point that procedural theories are not void of substantive values.¹³⁴

This being said, the key difference between the two lies in how procedure and "outcome" (i.e. the ethical values; or the list of capabilities) are perceived and prioritized. In Nussbaum's case, if the procedure leads us away from the correct standards, "the procedure" will have to yield to the rightness of the standards. In my view, this is insufficient. Nussbaum may have an explanation of how the standards come about, namely from her own ethical reasoning. But by demoting the procedure, she deflects an evaluation of the moral *acceptability* of the standards proposed. Without a formulation of procedural requirements, we can never know if the people and political and deliberative procedures can form the basis of a political conception – *other than if it corresponds with Nussbaum's suggested list of capabilities*. Nussbaum gives us no resources outside of the list for us to say if and when the procedure legitimately can *falsify* – and thereby "revise" – the list or ethical values that Nussbaum proposes. My argument then, is that Nussbaum has not only failed to provide a sufficient account of justification, but that she has also failed to give a satisfactory approach to social justice. It is not up to standard for a theory which aims at the *implementation of global justice* not to incorporate sufficient justificatory resources.¹³⁵ In practice, such a theory can turn out to be paternalist, static and unsustainable.

¹³⁴ Perhaps the difference rather lies in the focus on *substantial ethical* values versus *universal normative* values. In my opinion, the difference between the two is not necessarily as clear cut as often proposed. For instance, there are proceduralists within the school of critical social theory, and particularly within the discourse ethics, whom have suggested that "[...] the discourse ethicist insists upon the necessary disjunction as well as the necessary mediation between the moral and the ethical, the moral and the political." Benhabib, *The Rights of Others*, p. 16. See also, Seyla Benhabib, *Situating the Self: Gender Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 2007), p. vii. The most obvious synthesis is perhaps the one formulated in Jürgen Habermas, "Three Normative Models of Democracy," in *Democracy and Difference*, edited by Seyla Benhabib (Princeton: Princeton University Press, 1996).

¹³⁵ She does propose a series of institutional requirements that should be in place, if the capabilities approach were to be globalized: Nussbaum, *FJ*, pp. 315–324. However, none of these suggestions are in my view justificatory resources. They are rather tools of implementation.

In my view, the best, and perhaps only, way to provide sufficient elements of justification, is to incorporate and *prioritize* a procedural framework. This, and further implications of Nussbaum's demotion of procedural frameworks, will be discussed in the next chapter. The hope is that through such a critical account, an alternative and broader understanding of social justice will exert itself, and supply us with the correctives needed to mend the deficits of Nussbaum's approach.

4 Social Justice and Deliberative Politics

In the foregoing passages, some light has been shed on Nussbaum's approach to social justice and, in essence, how it relates to issues of justification. Underlying these discussions is a presupposition of normative justification as important for a theory's practical applications; this includes concerns for deliberative procedures and political legitimacy. My opinion is that Nussbaum, due to insufficient justificatory accounts, falls short in these respects, and that the capabilities approach could be improved by an addition of "theoretical resources." As I hope to show in this chapter, Nussbaum's capabilities approach needs to be grounded in a procedural framework. In this respect, I find several conceptions in the *Habermasian model of deliberative politics* sufficient to serve as relevant perspectives.

In my view, Habermasian proceduralism can supply Nussbaum's capabilities approach with some necessary correctives. This regards normative justification, but in continuation of this, also in respect of being able to prioritize and avoiding a reductionist account which is unable to criticise its own standards (4.2 and 4.3.). Before I proceed with these discussions, I find it appropriate to make some remarks on why I regard the Habermasian model as better fitted as a procedural framework for Nussbaum's approach than the Rawlsian one. I would also like to say something about what I intend to include when I suggest a 'Habermasian model' (4.1). That said, the objective of this thesis is to explore the potentials of Nussbaum's capabilities approach, and accordingly this chapter is not the place to introduce a series of new theoretical expositions and discussions. The comments will therefore be of necessity somewhat rudimentary.

4.1 From Contract Theory to Discourse Ethics

In my view, Nussbaum's approach could benefit from some of the justificatory resources in Habermas's discourse ethics. This would, in my opinion, give her the procedures she needs

to be able to legitimize, discuss and revise her normative standards of social justice. Whether there is a decisive difference between Habermas and Rawls in this respect is debated.¹³⁶ Still, I find the divergence between these two justificatory procedures so essential, it amounts in my opinion to more than just a “familial dispute.” Habermas himself has articulated the difference quite succinctly:

Rawls imposes a common perspective on the parties in the original position through informational constraints and thereby neutralizes the multiplicity of particular interpretive perspectives at the outset. Discourse ethics, by contrast, views the moral point of view as embodied in an intersubjective practice of argumentation which enjoins those involved to an idealizing *enlargement* of their interpretive perspectives.¹³⁷

The Habermasian procedure is structured by dialogue. It leads, successively, to an abstract level of agreement. The Rawlsian procedure may in contrast be read as *monological*. And *starts* by abstracting away from situational differences. According to Habermas, the difference between a dialogical and a monological outset has to do with how one regards something from “the moral point of view,” i.e. “[...] the standpoint from which moral questions can be judged impartially.”¹³⁸ In Rawls’s original position the subject is made into a *neutral observer* freed from the many perspectival interpretations of the disputing parties – one is only concerned with one’s own rational plans of life. However, this “[...] has the disadvantage that it isolates him in a monological fashion from the interpretive

¹³⁶ For instance, Chantal Mouffe refers to Rawls and Habermas as liberal deliberative democrats both and, in essence the same: They are both culpable of advocating a consensus building and hence exclusionary, “third way” politics. She does, however, classify them as belonging to “different schools.” Chantal Mouffe, *The Democratic Paradox* (London: Verso Books, 2009), p. 84.

¹³⁷ Habermas, “Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism,” p. 117. See also: Habermas, “Three Normative Models of Democracy,” p. 28–29: Whereas the liberal model of democracy relies on democratic will-formation merely as a *legitimizing* factor for the exercise of political power – as a “monitoring device” – the deliberative model advocates a stronger influence of discursive rationalisation – that it should “program” the exercise of political power as well.

¹³⁸ Habermas, *Justification and Application*, p. 48.

horizons of the participants and denies him hermeneutic access to an intersubjectively shared moral world that reveals itself only *from within*.” To take on others’ perspectives one must engage with them through communication and dialogue. Norms are formed and played out in intersubjective contexts, and so one cannot exclude oneself from this sphere when judging them.

Given Nussbaum’s somewhat similar critique of Rawls’s procedural outset, I believe the Habermasian model could provide a frame that is more attuned to the capabilities approach’s demand for heterogeneous needs interpretation; furnish a more dynamic conception of the private–public distinction;¹³⁹ and give a more adequate description of social motivation and cooperation.¹⁴⁰ It can seem like Sen tends to agree with me on this point.¹⁴¹ As I have discussed above, Nussbaum distrusts proceduralist approaches, and this

¹³⁹ “Discourse theory conceives of morality as an authority that crosses the boundaries between private and public spheres; these boundaries vary throughout history anyhow, depending on the social structure.” Habermas, *Between Facts and Norms*, p. 109.

¹⁴⁰ Nussbaum calls for a redefined conception of “the circumstances of justice.” She finds the social contract tradition wrong in presupposing that the cooperation amongst human beings is dependent on mutual advantage, and suggests instead an Aristotelian conception: The capabilities approach “[...] uses a political conception of the person that views the person, with Aristotle, as a political and social animal, who seeks a good that is social through and through, and who shares complex ends with others at many levels. The good of others is not just a constraint on this person’s pursuit of her own good; it is a part of her good.” *FJ*, p. 158. In my view, this is more in line with the Habermasian tradition, where the self is regarded as socially and communicatively constituted, than the Rawlsian social contract. Habermas claims that the shared moral point of view “[...] must be derived from the structure in which all participants in interaction *always already* find themselves insofar as they act communicatively.” See Jürgen Habermas, *Moral Consciousness and Communicative Action*, translated by Christian Lenhardt and Shierry Weber Nicholsen (Cambridge: Polity Press, 1992), pp. 162–163.

¹⁴¹ Sen, *The Idea of Justice*, p. 42–43. Sen “sees the force” of Habermas’s critique against Rawls. Still, he believes it is unclear whether the different procedures would result in radically different political systems.

might be the reason why she does not consider this alignment herself. In my opinion this is unfortunate.¹⁴²

Furthermore, by suggesting a ‘Habermasian model’ I mean to include both the theory of Jürgen Habermas *and* his “feminist correctives”¹⁴³ – i.e. Seyla Benhabib and Nancy Fraser. To be sure, there are several differences between the advocates of the Habermasian school of deliberative politics. But I believe there is enough convergence among them to label them as proponents of the same basic model. Seyla Benhabib has articulated a broadening of the scope of political membership within the tradition of discourse ethics.¹⁴⁴ She also focuses on the importance of dialectic balance between normative sources; that is, a balance between emotion and context, and rationality and ideal.¹⁴⁵ In my opinion, both these contributions correspond to important conceptions in Nussbaum’s approach: her argument for the inclusion of the disabled, non-human animals, and non-nationals; and, her confidence in the intelligence of emotions. Nancy Fraser, has on her account, suggested an “opening up” of the concept of the public sphere. While Habermas does indeed suggest

¹⁴² Especially so, when she sticks to the view that the capabilities approach could be read as an “extension to” or as “an alternative to,” what she deems as the second best alternative, namely Rawls’s procedural social contract theory. Nussbaum, *FJ*, p. 94–95.

¹⁴³ Nancy Fraser, “What’s Critical about Critical Theory;” and Seyla Benhabib, “The Debate over Women and Moral Theory Revisited.” Both in *Feminists Read Habermas: Gendering the Subject of Discourse*, edited by Johanna Meehan (New York: Routledge, 1995).

¹⁴⁴ Benhabib, *The Rights of Others*, pp. 12–13: “On the first reading the theory [of discourse ethics] seems to exclude from moral agency and moral representation those who are not capable of full speech and action. [...] I have suggested [however] that the moral interests of beings who are not full participants in moral discourses ought to be and can be effectively represented in discursive contexts through systems of moral advocacy.”

¹⁴⁵ Whether it is correct to see Habermas as actually suggesting a morality that is too rational and ideal is highly disputed. According to Benhabib, however, he does converge too strongly with the views of Lawrence Kohlberg, and at the same time he can seem to demote the insights of Carol Gilligan. For more on what has been called the “Kohlberg–Gilligan Controversy,” see: Benhabib, *Situation the Self*, 178–202. I believe Nussbaum is in line with Benhabib on this point. This being said, neither Nussbaum nor Benhabib claims that rationality is secondary to emotions, nor does Nussbaum regard it as an obvious conflict between rationality and emotions. See: Nussbaum, *SSJ*, pp. 73–81.

both formal and informal bodies of deliberation,¹⁴⁶ Fraser still sees the need for a revision of the Habermasian ideal. Thus, she introduces the concepts of *participatory parity*¹⁴⁷ and *subaltern counterpublics*.¹⁴⁸ In my view, this corrective could offset some of Nussbaum's concerns with what she regards as "the conservativeness of power," latent in proceduralist approaches. It would also seem a necessary supplement if Nussbaum's approach were implemented in areas where ideal democracies are not yet a reality. With a framing within the procedural conceptions of these theories, I think Nussbaum's approach could become more complete and actually fulfil the intentions I interpret it to embody.

4.2 Capabilities and Procedural Frameworks

In the following two passages, I hope to illuminate some of the areas in which the Habermasian model of deliberative politics could supplement Nussbaum's capabilities approach. While it doubtless would have been of interest, I am unable to construe an exhaustive synthesis of the two approaches in this context.

4.2.1 A Question of Priority

My dispute with Nussbaum is not in regard of the contents of her ethical views. It is rather concerned with the structure of her theory, and the status she assigns to political and

¹⁴⁶ Habermas, "Three Normative Models of Democracy," p. 28.

¹⁴⁷ *Participatory parity* can be read as analogue to the ideal of equality and symmetry in deliberative procedures. However, according to Fraser, "participative parity is an interpretative ideal of social justice, and as such, does not exist. Instead, those who wish to live in the condition of participative parity should use the concept as a critical ideal to enable them, precisely, to reveal the existing disparities in participation, the asymmetries and the blocks placed by power, etc., and above all, to identify those obstacles that are rooted in social relations." See Martha Palacio Avendaño, "Interview with Nancy Fraser: Justice as Redistribution, Recognition and Representation" (<http://www.barcelonametropolis.cat/en/page.asp?id=21&ui=181>).

¹⁴⁸ The *subaltern counterpublics* are often constituted by members of subordinated social groups, such as women, workers, peoples of colour, and gays and lesbians. Fraser says, "I propose to call these subaltern counterpublics in order to signal that they are parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs." Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," *Social Text* 1990, No. 25/26: 56–80, p. 67.

procedural deliberation. Nussbaum has included what can be regarded as *deliberative* or even *procedural* capabilities on her list. Especially, capability number 6 – *practical reason* and capability number 10 – *political control* are important in this respect. If the capabilities approach were to become a procedural theory, we could see these capabilities as important elements of in the procedural framework. On the other hand, she does not give these capabilities any structural priority.¹⁴⁹ This is in strong contrast to Rawls, who gives his principle of liberty, in which civil and political liberties are included, lexical priority; that is, they cannot be compromised by either economic efficiency or economic justice. Similarly, for Habermas, the *discourse principle* will always have normative priority in the establishment of other norms or rights: “According to the discourse principle, just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses.”¹⁵⁰ The principle forms a normative presupposition that cannot be compromised. I see the priority of such a thing as the discourse principle as a necessary justificatory presupposition, but it is also important to enable precedence to be set amongst other norms and rights.

The fact that Nussbaum does not give structural priority to political or deliberative capabilities makes it difficult for Nussbaum to *prioritize* the different capabilities; different people;¹⁵¹ and to give normative standards of equality and distribution *above* the

¹⁴⁹ In Nussbaum’s defence, she does admit that political capabilities serve a special role. Quoting Sen, she says that “Political rights are important not only for the fulfilment of needs, they are crucial also for the formulation of needs. And this idea relates, in the end, to the respect that we owe each other as fellow human beings.” Nussbaum, *WHD*, p. 96. In my view, though, her acknowledgement of Sen’s point is not enough to make up for the structural demotion of procedures within Nussbaum’s own theory.

¹⁵⁰ Habermas, *Between Facts and Norms*, p. 127.

¹⁵¹ Seeing the normative deficit of not being able to distribute above the basic threshold level, Nussbaum has in fact suggested Rawls’s difference principle as a possible extension to her own theory. Nussbaum, *WHD*, p. 86. It is unclear to me, however, how she pictures Rawls’s difference principle to operate sufficiently without Rawls’s first principle as a guiding factor.

threshold.¹⁵² Even if, as Nussbaum claims, none of the capabilities can be compromised, we do know conflicts arise. A conflict can emerge between different groups wanting the same scarce resource, or between capabilities inherent to one individual. For instance in the case of adaptive preference formation, there can be conflicts between the right to political control over one's environment and other capabilities – i.e. bodily health, bodily integrity, or religious practices. In such instances, what can Nussbaum appeal to in order to solve potential conflicts?

Nussbaum's alternative could possibly be to say, the "plurality of the list is irreducible."¹⁵³ Which means none of the capabilities are up for compromise. At the same time, however, because she sees the dangers of paternalism in counter with the fact of (historical and cultural) pluralism, Nussbaum states that the list is revisable, open, and up for discussion. In my opinion, Nussbaum needs to ascertain whether the plurality of the list is irreducible because she sees the danger of not having prioritized any procedural political mechanisms. To ensure political capabilities are not traded off in a "cost-benefit analysis" – where one from a social engineering point of view can always make a reasonable argument for the priority of social standards, health standards, educational standards etc – she finds it necessary to limit the scope of bargaining. In my view, this can be read as inconsistent; it would not constitute a very viable approach in terms of practical implementation.

In my view, the Habermasian model of deliberative politics can be seen as having solved these problems in advance, by posing a procedural outset that is governed by dialogue and intersubjectivity. Within such a model, rights, or as in our case, capabilities, are viewed "[...] as features of relationships, contingent upon negotiation within a community committed to this mode of solving problems [...]."¹⁵⁴ They are not, as they appear to be in Nussbaum's capabilities approach, regarded as "possessions" one can distribute to

¹⁵² This critique is related to the one posed on Rawls's behalf above, concerning the intuitionist's inability to weight between contrasting intuitions.

¹⁵³ Nussbaum, *WHD*, p. 81.

¹⁵⁴ Habermas, *Between Facts and Norms*, p. 425.

individuals, from above. Functional capabilities are things one *does*, more than things one *has*. From the Habermasian perspective, therefore, they need to be regulated by more than just distributive patterns. They presuppose normative and institutional levels of negotiation that cannot be assimilated to the logic of distribution. This can, in my view, be such as deliberative procedures, or even democracy.¹⁵⁵ It can be argued that even on very basic levels of realizing capabilities, such procedures are necessary.¹⁵⁶ I believe Nussbaum would agree to the importance of these normative procedures, but it can seem like she overlooks them as necessary *presuppositions* in the negotiation and prioritization of capabilities: these normative procedures are not something that can be postponed until a later stage in the development of capabilities.

4.2.2 A Political Conception of the Person?

In *Women and Human Development* Nussbaum dismisses suggestions according to which her theory *must* prescribe complete systems of justice and political participation above the threshold level. “[T]he determination of such additional requirements of justice awaits another inquiry.”¹⁵⁷ One could perhaps say that Nussbaum has chosen to construe a

¹⁵⁵ Amartya Sen has focused on the *role* of democracy in terms of several aspects that are relevant in this respect: Firstly, it plays a role in constituting political unity. He expresses it such that “[t]he practice of democracy gives citizens an opportunity to learn from one another, and helps society to form its values and priorities.” Amartya Sen, “Democracy as a Universal Value,” *Journal of Democracy*, 10/3, 3–17, p. 10. He has further asked how the inclusion of women in deliberative procedures could enhance their practical reason and increase their ability to evaluate their own (adaptive) preferences. Elisabeth Anderson, “Sen, Ethics, and Democracy,” in *Amartya Sen’s Work and Ideas – A Gender Perspective* edited by Agarwal, Bina, Jane Humphries and Ingrid Robeyns, (London: Routledge, 2005), p. 252.

¹⁵⁶ “In the context of his study of the causes of famine [...], Sen highlighted the fact that the practice of democracy and public discussion plays a crucial role in avoiding famines and other societal failures, and more constructively in the identification and realization of even people’s most basic ‘entitlements’ or ‘capabilities’ of nutrition, health and education.” John M. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, (Aldershot Hampshire: Ashgate Publishing Limited, 2008), p. 148.

¹⁵⁷ Nussbaum, *WHD*, p. 75.

Rawlsian *non-ideal theory* instead of *an ideal theory*;¹⁵⁸ and that she has deflected to articulate normative ideals in order to handle problems that are more urgent. On the other hand, and particularly so in *Frontiers of Justice*, Nussbaum's standards for global social justice are both comprehensive and ambitious; especially, I think, compared to Rawls's alternative in *The Law of Peoples*. Her standards aim at more than just a basic level, they aim at "human flourishing" and "truly human lives." The standards can be said to reach far beyond a bare minimum requirement as well as transcending the ideal–non-ideal distinction.¹⁵⁹ Nor, does it seem like the operationalization of the capabilities approach is meant to be limited to a "pre-political level." In fact, I am not sure whether Nussbaum's conception of *the political* would even allow of such a distinction: "The political conception of the person that [the capabilities approach] uses includes the idea of the human being as 'by nature' political, that is, as finding deep fulfillment in political relations, including, centrally relations characterized by the virtue of justice." With this in mind, I find it odd that Nussbaum demotes such a thing as a deliberative procedure. Something distinctly human would seem to be lost when the political no longer is admitted a special role or priority.

Seen from Fraser's perspective, Nussbaum's approach can be regarded focusing too much on standards of social justice, and this at the price of procedural norms that can justify and discuss such standards. If, on the other hand, it would have applied a dialogical procedure, with an ideal of participatory parity, it could have increased its ability to revise, discuss and interpret issues of justice in a more dynamic and critical manner. In the case of adaptive

¹⁵⁸ According to Rawls, *ideal theory* presupposes both compliance by all citizens and a reasonable set of social conditions. *Non-ideal theory*, however, deals with how we actually can reach the ideal situations set by the *ideal theory*. Hence, non-ideal theory can be said to presuppose ideal theory. If we should read Nussbaum's theory as non-ideal, which I don't think we should, then she can seem to have skipped this first level. For a succinct description of ideal and non-ideal theory, see: The Stanford Encyclopedia of Philosophy, "2.3 Ideal and Non-Ideal Theory" in *John Rawls*.

<http://plato.stanford.edu/entries/rawls/#IdeNonIdeThe> (first published March 25, 2008).

¹⁵⁹ In my view, if the "Central Human Functional Capabilities" were to be implemented, they would not only make a difference in underdeveloped states, but in highly developed welfare states as well.

preference formation, the dialogical approach could offer an alternative to the utilitarian view, where the misrecognized subjects, often with lack of self-esteem, would have the only and final say in what is just. “At the same time,” Fraser says, “it [i.e. the dialogical approach] also precludes the authoritarian view, assumed by some theorists of self-realization, that a philosophical expert can and should decide what is needed for human flourishing.”¹⁶⁰ According to Fraser, both the utilitarian and the authoritarian approach, which could be ascribed to Nussbaum, are monological, and, hence, lack the resources to both discuss and solve such issues as adaptive preferences or misrecognition in an adequate way.¹⁶¹

It is ironic that from Fraser’s perspective, Nussbaum takes on a *platonic* stance, which with its homage to “the philosopher king” authorizes a theoretical expert as author of the requirements of justice, in stead of prioritizing deliberative procedures.¹⁶² In other respects, Nussbaum would be regarded as an Aristotelian, and as I have shown, she assumes an Aristotelian concept of human beings as naturally political. It seems as a more natural alignment for Nussbaum, therefore, to take on the stance of a deliberative model of politics.¹⁶³ The deliberative, dialogical model treats neither the views of the claimants, nor

¹⁶⁰ Nancy Fraser, “Social Justice in the age of Identity Politics: Redistribution, Recognition, and Participation,” in *Redistribution or Recognition: A Political-Philosophical Exchange*, edited by Nancy Fraser and Axel Honneth (London: Verso, 2003), p. 43. Fraser does not explicitly refer to Nussbaum in this passage, but it is quite obvious that it is Nussbaum she has in mind. My addition in the square brackets.

¹⁶¹ It can even be argued that Nussbaum is *more* monological than Rawls. According to Fraser, an approach such as Nussbaum’s is monological because it vests in a single subject, i.e. Nussbaum herself, the authority to interpret the requirements of justice. Fraser, “Social Justice in the age of Identity Politics,” p. 43.

¹⁶² Nussbaum, “Social Justice in the age of Identity Politics,” pp. 70–71.

¹⁶³ Fraser contrasts the platonic stance to the *Aristotelian stance*, but here the democratic commitment is so strong that *all* theoretical arguments are rejected, and the result is an empty and formalist procedure. “Social Justice in the age of Identity Politics,” p. 71. In my view, a more natural alignment for Nussbaum will therefore be a procedure combining theorists’ opinions and citizenry, and I find the Habermasian model of deliberative politics to open up for such a combination.

of experts as infeasible. It offers a procedure which is more substantial than mere formalism, and takes its legitimacy from dialogical judgement.

In an approach such as Nussbaum's, needs are perceived as pre-given and unproblematic, instead of as things in need of participatory processes and needs-interpretations.¹⁶⁴ It is true that she prescribes deliberative processes in relation to the local expressions of functions, but it can still seem as though she needs a level of reflexivity even for the level of basic capabilities. According to Fraser, it is necessary to be able to preserve a possibility for *radical critique* of the justice standards proposed in the status quo. "Much discourse," Fraser states, "about justice has an in-built conservative bias; focused on ensuring fair access to existing social goods, it tends not to question whether those are the 'right goods'."¹⁶⁵ To be able to do pose radical critique, we need a deliberative procedure, constituted on dialogue and multiple interpretations. According to Fraser, "[t]his requires raising (first-order) claims for redistribution and recognition, to be sure. But it also requires raising second-order or meta-level claims about the conditions in which the first-order claims are adjudicated."¹⁶⁶ Only by incorporating a procedure where such meta-reflection is possible, can we, in my view, ensure that a list of capability standards such as Nussbaum's can be discussed, revised and exposed to radical critique. I find that a deliberative procedure can provide Nussbaum with a necessary corrective. It can make the capabilities approach more dynamic and even more able to criticise patterns of power and injustice.

¹⁶⁴ Nancy Fraser, "Chapter 7: Women, Welfare and the Politics of need Interpretation," in *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Oxford: Polity Press, 1989), p. 156.

¹⁶⁵ Fraser, "Social Justice in the age of Identity Politics," p. 44.

¹⁶⁶ Fraser, "Social Justice in the age of Identity Politics," p. 44.

5 Conclusion

By comparing Nussbaum's approach to social justice with others, such as utilitarian welfare theories and Rawls's justice as fairness theory, I find that it embodies a radical standard of social justice (chapter 2). This is because it dares to define a standard of human functional capability, as well as reaching beyond traditional conceptions of political membership. The capabilities approach lays special emphasis on the feminist perspective, while it also addresses the disabled, non-nationals and indeed other forms of life. As a consequence I find the capabilities approach can provide us with a comprehensive benchmark for the realization of positive freedom and de facto rights attainment. For these reasons I think Nussbaum's capabilities approach deserves the vast attention it has received vis-à-vis theories of global justice and implementation of international development goals.

However, my analysis of the capabilities approach's theoretical structure and resources (chapter 3) shows that it lacks a sufficient account of justification. It does not have the necessary procedures for evaluating the acceptability of the suggested standards, and it is therefore difficult to see how the standards can be falsified or even revised without appealing to Nussbaum's own ethical account or internal realism. In my view, this is not only paternalistic and non-viable in terms of cultural pluralism and history; it is also at odds with the real intentions of Nussbaum's approach.

Nussbaum intends her list of capabilities to be open, revisable and up for discussion. But as I have tried to argue (chapter 4), in order to ensure these aspects of her theory, her approach must, I contend, be grounded in a procedural normative framework. In this respect, I regard the Habermasian model of deliberative politics as best suited to accommodate both the premises and aspirations of Nussbaum's approach. Combining a comprehensive standard of social justice, which the capabilities approach represents, with the normative procedures of the deliberative tradition, especially the feminist variations, would be an interesting topic to

pursue at a later occasion. In this thesis, however, I hope to have given a viable argument for the necessity of such an alignment, as well as something of what it would entail.

In this thesis my primary task was to explore the potentials of Nussbaum's capabilities approach, especially in terms of how she balances norms requiring respect for cultural diversity and individual choice with the need to challenge the effects of unjust social power. In feminist theories of social justice, the importance of the latter will on occasion legitimately override the former. Nussbaum, however, seems to make it a rule. In my view, the deliberation and interpretation of own needs should be regarded as an equally essential feminist demand. It might be Nussbaum's intent to embody such an anti-paternalist perspective; nonetheless, the theoretical structure does not suffice to include it. To be sure, there are *indispensible qualities* in the capabilities approach. By way of its conceptions it can uncover the discrepancies between ideal rights and welfare achievements, on the one hand, and real opportunities, on the other. It takes as its starting point the perspectives of marginalized groups, and finds it, therefore, necessary to explicate entitlements and needs. These aspects should not be underrated. That being said, if the aspiration is to be a theory of (global) justice, it needs to be supplemented by a deliberative procedure, as the Habermasian model of deliberative politics. By giving such a procedure structural and normative priority, the capabilities approach can, in addition to achieving political stabilisation, facilitate both continuous local interpretation as well as normative evaluations of acceptability.

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